TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 464.

PURITY EXTRACT AND TONIC COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

C. C. LYNCH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED NOVEMBER 11, 1911.

(22,931)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 855.

PURITY EXTRACT AND TONIC COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

C. C. LYNCH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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1 In the Supreme Court of Mississippi, October Term, A. D. 1911.

Pleas and proceedings, had and done, at a regular term of the Supreme Court of Mississippi, at the Court room, at the Capitol in the City of Jackson, on the Second Monday, being the 9th day of October A. D. 1911, in the case of:

15179.

PURITY EXTRACT & TONIC CO.
vs.
C. C. LYNCH.

2 Pleas and Proceedings had and done at a regular term of the Circuit Court in and for the Second District of Hinds County, Mississippi begun and held at the Court House thereof in the Town of Raymond on the 1st Monday, and being the 6th day of February 1911 A. D.

Present the Hon. W. A. Henry, Judge of the Seventh Judicial District of the State of Mississippi and Presiding Judge of said Court; Hon. M. S. McNeil, District Attorney; R. J. Harding, Sheriff; E. D. Fondren, Clerk; J. W. Bloomfield, Stenographer.

Declaration.

In the Circuit Court of Hinds County, Second District, State of Mississippi.

THE PURITY EXTRACT AND TONIC COMPANY
v.
C. C. LYNCH.

Comes the Purity Extract and Tonic Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Tennessee, and having its residence and legal domicile therein, and complains of C. C. Lynch, resident and citizen of the City of Chattanooga, State of Tennessee, but to be found in said Hinds County, Mississippi, and for its cause of action states.

That plaintiff on the 23d day of November 1910, made and entered into a certain contract with said defendant Lynch in the City of Chattanooga, State of Tennessee, whereby plaintiff agreed to sell and deliver f. o. b. cars at Chattanooga, Tennessee, in shipment to Jackson, Mississippi, to the defendant, Lynch, and said Lynch agreed then and there to purchase from plaintiff a certain commodity called "Poinsetta", and which in and by said agreement, a copy of which is herewith filed, marked Exhibit "A," and made a part hereof

3 as if set forth specifically herein, said defendant contracted and agreed to and with plaintiff that he would sell only in

the County of Hinds, State of Mississippi, said "Poinsetta", and at the price named in the schedule attached to said agreement, namely:

"Regular pint bottles per cask (10 dozen) $7.00
"Split bottle size per case of six dozen; ..... 3.35."

and upon the terms named in said contract.

That in and by said contract Exhibit "A," "Said seller (plaintiff) contracts and agrees that the right so to sell and dispose of said Poinsetta in said County of Hinds for and during the period of five years from and after said date will be vested in said buyer exclusively, and that he and he alone shall have the right to sell the same within the limits of said County.";

And for the consideration thereof "Said buyer (defendant) contracts and agrees to pay the seller (plaintiff) hereunder within five days from and after the delivery of this contract, the sum of Five Hundred ($500.00) Dollars for said exclusive right to sell Poinsetta within said County of Hinds, during said period of five years."

That defendant upon coming to Hinds County, State of Mississippi, to sell said Poinsetta, then and there refused to perform or be bound by said contract and repudiated the same and refused to pay said sum of Five Hundred ($500) Dollars, or any part thereof, or to perform said agreement for the sale thereof.

Wherefore, an action hath accrued to the plaintiff to have and recover of said defendant, Lynch, said sum of Five Hundred ($500) Dollars with interest thereon.

GREEN & GREEN.

4 EXHIBIT "A" TO DECLARATION.

This Contract made and entered into this 23rd day of November nineteen hundred and ten by and between The Purity Extract and Tonic Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Tennessee and having its residence and legal domicile therein, and hereafter for convenience called the Seller, and C. C. Lynch, a resident and citizen of the City of Chattanooga, State of Tennessee, and hereafter for convenience called the Buyer.

Said Seller contracts and agrees to sell upon the terms and price shown upon the list hereunto annexed and said buyer contracts and agrees to buy of and from the seller that commodity called Poinsetta for and during a period of five years from and after January 1, 1911, and the seller agrees to deliver the same, properly boxed, to the Railroad Company at Chattanooga, Tennessee, for shipment to Jackson, Mississippi, to buyer f. o. b. cars, Chattanooga, Tennessee.

Said buyer contracts and agrees to and with said seller that said Poinsetta will be sold only in the County of Hinds, State of Mississippi, and to sell and dispose of the same within said County said buyer will use all of his best efforts and give his time to the sale thereof.

Said seller contracts and agrees that the right so to sell and dispose of said Poinsetta in said County of Hinds for and during the

period of five years from and after said date will be vested in said buyer exclusively, and that he and he alone shall have the right to sell the same within the limits of said County.

Said buyer contracts and agrees to pay the seller hereunder within five days from and after the delivery of this contract, the sum of Five Hundred ($500) Dollars for said exclusive right to sell Poinsetta within said County of Hinds during said period of five years.

5 The price list is marked Exhibit "A" hereto and the price mentioned shall govern during the entire time that this contract shall be in force.

Should said buyer wish at the expiration to renew this contract, he can do so upon the payment of Five Hundred ($500) Dollars additional but said seller shall have the right at that time to alter the price list so that it will conform to the price list then current.

THE PURITY EXTRACT & TONIC COMPANY.

(Signed) Per CHARLES TEIF, *President.*

(Signed) C. C. LYNCH.

Dated at Chattanooga, Tennessee, this 23rd day of November, 1910, in presence of:

Witnesses:

F. B. DICKINSON.

J. F. HARTLEY.

EXHIBIT "A."

Prices for Poinsetta for Hinds County, Mississippi, per Agreement With C. C. Lynch.

Regular pint bottles per cask (10 dozen)	$7.00,
Split bottles size per case of six dozen:	3.35.

Allowance for empty bottles to be at the rate of thirty cents (30¢) per dozen whether large or small f. o. b. Chattanooga, Tennessee.

These prices are for delivery in car load lots and when ordered in less than car load lots, the difference in amount of freight is to be added.

Filed Jan'y 27, 1911.

E. D. FONDREN, *Clerk.*

6 *Plea.*

In the Circuit Court of Hinds County, Second District, State of Mississippi.

THE PURITY EXTRACT AND TONIC COMPANY

v.

C. C. LYNCH.

Now comes C. C. Lynch defendant herein, in his own proper person, and enters his appearance herein and for plea to the declaration herein states:

That he admits the making of said contract Exhibit "A" to the declaration, and that said contract contemplated, as recited therein, a sale of Poinsetta for a period of five years from and after January 1st, 1911, exclusively by this defendant in Hinds County, State of Mississippi, and that upon coming to Hinds County, Mississippi, from the City of Chattanooga, Tennessee, for the purpose of the execution of this contract in the sale of said Poinsetta, he found that under the laws of the State of Mississippi, it is unlawful to sell or barter or give away to induce trade, any alcoholic, malt, vinous or intoxicating bitters, or other strong drinks, which if drunk to excess will produce intoxication, and that said Poinsetta was made of malt, unfermented, and without alcohol, but under interpretation of the Supreme Court of Mississippi in Fuller v. City of Jackson, decided in the Supreme Court of Mississippi on May 30, 1910, and the interpretation of the Attorney General of the State of Mississippi of Chapters 13, 14, 15, and 16, Laws of Mississippi of 1908, it was unlawful to sell said Poinsetta in the State of Mississippi, and especially in the County of Hinds, and this defendant for this reason refuses to perform said contract and repudiates the same, and refuses to pay said Five Hundred ($500) Dollars sued for or any part thereof, and this he is ready to verify.

C. C. LYNCH,
WILLIAMS & LANCASTER,
Attorneys for Defendant.

Filed: Jan'y 28, 1911.
E. D. FONDREN, *Clerk.*

7 *Replication to Plaintiff's Plea.*

In the Circuit Court of Hinds County, Second District, State of Mississippi.

THE PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

Now comes the plaintiff by attorney and for replication to the plea of said defendant, C. C. Lynch, denies that said Poinsetta is forbidden to be sold in the State of Mississippi under the laws thereof, but avers that if said laws of the State of Mississippi attempt to prohibit the sale of said Poinsetta, then that they and each of them are contrary to the Federal Constitution, null and void, in this that said Poinsetta and the right to sell it do not fall within the police powers of the said State of Mississippi, and an attempt to deprive this plaintiff of said right to make and sell said Poinsetta would be to deprive it of its liberty and property without due process of law, and deny to it the equal protection of the law contrary to the provisions of the Federal Constitution, and also those sections of the Federal statutes permitting the regulation of intoxicating liquors by the States, in that, said Poinsetta does not fall within said class so allowed to be dealt with by Congress and that it is to be brought into the said

State of Mississippi in bottles each in an original package, and that the right to sell the same then and there is protected by the Federal Constitution, and that if the said State attempted to take away said right, said attempt would then and there be null and void because in conflict also with that section of the said Constitution, and the several Acts of Congress passed in pursuance thereof, and of all of this plaintiff puts itself upon the country.

GREEN & GREEN.

Filed, Jan'y 28, 1911.
E. D. FONDREN, *Clerk*.

8 *Agreed Statement of Facts.*

In the Circuit Court of Hinds County, Second District, State of Mississippi.

THE PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

This agreement made this 3rd day of December, 1910, by and between the Purity Extract and Tonic Company, plaintiff, and C. C. Lynch, defendant in the above styled cause witnesseth:

Whereas, on the 23rd day of November, 1910, the parties hereto entered into a certain contract in writing, a copy of which is hereto attached, marked Exhibit "A," and is made a part hereof; and,

Whereas, suit having been brought thereon, to save expense and delay, it is deemed advisable to make the following agreement as to facts:

It is therefore agreed as follows:

1. That Poinsetta, the drink described in said Exhibit "A" is a beverage composed of 90.45% of pure distilled water and 9.55% of solid matter, namely hops, barley, malt, and other cereals; that all of said solid matter is nutritious and healthful and in no respect is it, or any ingredient thereof, harmful; and that said drink contains no alcohol or saccharin matter.

2. That said drink is made by plaintiff at Chattanooga, Tennessee, according to a formula obtained from a German scientist, plaintiff having purchased from said person the exclusive right to make and to sell said beverage in America. The said formula and the process of making the said drink constitute trade secrets and because of such the same cannot be disclosed. It is agreed, however, that the methods used in the manufacture of said drink are sanitary, scien-

9 tific and healthful, and that the drink produced thereby is healthful, harmless, and nutritious, constituting a liquid food that is palatable and refreshing.

Witness our hands this 3rd day of December, 1910.

PURITY EXTRACT & TONIC COMPANY.
CHARLES REID, *President*.
C. C. LYNCH.

Witnesses:
J. S. OLIVER.
J. S. HARTLEY.

9½ In the Circuit Court of Hinds County, Second District, State of Mississippi.

PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

It is agreed between the respective parties hereto that for the purpose of avoiding the expense incident to the production of witnesses that the court shall determine the questions of law presented by the pleadings upon the admissions respectively made by the several parties hereto in this agreed statement of facts, and that this agreed statement of facts and the prior agreed statement of facts shall constitute the entire evidence whereunder said questions so presented shall be determined.

Whereas on the 23rd day of November, 1910, plaintiff and defendant made a certain contract, in writing, a true copy whereof is hereto annexed, and which for the purpose of this trial shall be deemed an original, being marked Exhibit "A" hereto and made a part hereof, and,

Whereas, suit has been brought for recovery upon said contract.

Now, therefore, it is agreed as follows,—

1. The said contract, Exhibit "A" to the declaration was made and entered into between the respective parties hereto, in good faith, and that said defendant is desirous of performing said contract and of making said payment if so to do does not violate the statutes of the State of Mississippi in that behalf made and may be considered evidence as there made.

10 2. Poinsetta, the beverage described in said Exhibit "A" is composed of 90.45% of pure distilled water and of 9.55% solids, but all of which solids are derived from cereals and are in an unfermented state, and are wholesome and nutritious. It contains no alcohol whatsoever, neither does it contain sacc-arine matter. A correct analysis is attached hereto. It contains 5.73% of malt and is sold as a beverage.

3. Said beverage is manufactured by plaintiff at Chattanooga, Tennessee, under a formula obtained from German scientists of whom plaintiff for value purchased the exclusive right to manufacture and sell said beverage in the United States. The formula thereof and the process of making the same under the contract constitute trade secrets and cannot be disclosed but it is admitted that the *schedule* used in manufacturing said beverage are wholesome and that the same is compounded in a sanitary establishment.

4. It is agreed that in the manufacture thereof the cereals employed are not treated in the same way as are those used in the preparation of any malt beverage containing alcohol and which are in any way intoxicating, but under said formula the treatment of said grain is that in extracting the valuable food properties therefrom and in combining them with said water that said grain is not either so fermented or steeped in water or other solvent as to produce sacc-arine

matter or alcohol, and that said beverage when so prepared containing said solids derived from said grain contains none of the properties of any alcoholic drink, nor of any malt drink that will intoxicate, but while technically speaking the primary process employed in the production of Poinsetta may have some few elements in common with those employed in preparing grain in the first stages for malting for porter, ale, or beer, still the process thereafter
11 used in the preparation of Poinsetta are so radically and vitally different that they do not bring into said beverage either sacc-arine matter or alcohol, but are effectual in integrating into said beverage to a large per cent the food values contained in unfermented grain.

5. Poinsetta contains no alcohol. It contains no sacc-arine matter. It contains some portions of barley, malt, hops and other cereals, but neither fermented nor treated so as to produce any of the properties of any malt liquor which will produce intoxication.

Poinsetta is guaranteed under the purse food laws of Congress and no matter to what extent taken will not produce intoxication.

6. Its taste is distinctive and different from any intoxicating malt liquor or any other liquor. Its appearance is such that it would not probably be mistaken for any intoxicating liquor. It has a distinctive odor dissimilar from that of any intoxicating drink, and cannot be employed as a subterfuge for the sale of beer because it is bottled in a distinctive way and its name blown in each bottle which contains the beverage.

7. Poinsetta is put up in bottles at Chattanooga, Tennessee, and is shipped in bottles, each separate and apart from the other, placed in a case to which they are in no way attached, and which is done merely to prevent breakage of the bottles in transit. The case is not fastened with nails or other device but merely closed. The bottles so contained are shipped in interstate commerce from Chattanooga, Tennessee, and are to be received under the contract by the consignee in Mississippi in the same condition as when bottled, and are to be sold as each several package. There is to be no retail
12 sale under said right by said Lynch in the State of Mississippi, but all shipments are to be made direct either to said Lynch, or to other persons who shall desire to purchase said drink, and are to be delivered to said purchasers of said bottles in precisely the same shape as prepared in Tennessee, and said Poinsetta is still contained in the original package at the time it will be offered for sale in Mississippi by the purchaser thereof in the original package which was sent from Tennessee through Alabama into Mississippi.

8. The United States Government does not treat Poinsetta as within the class of intoxicating liquors and does not require anything to be done with reference to its sale.

9. A large amount of capital has been invested in the plant of plaintiff where this beverage is manufactured and the right to manufacture and sell it in the United States was purchased at large cost and a business has been built up at great expense and the right to sell it in Mississippi is of great value and should it be denied irreparable damage would be done.

10. That the State of Mississippi through the State Chemist has analyzed Poinsetta and a true copy of his analysis is hereto attached and therein it is shown that it does not contain any alcohol. The same being Exhibit "B."

THE PURITY EXTRACT & TONIC CO.,
Per J. H. BROCKHAUSE, JR.
C. C. LYNCH.

Witnesses:
J. S. OLIVER.
J. S. HARTLEY.

Filed February 7th, 1911.
E. D. FONDREN, *Clerk.*

13 *Analysis.*

NASHVILLE, TENN., *Dec.* 11, 1909.

Purity Extract & Tonic Company, Chattanooga, Tennessee.

GENTLEMEN: Samples of Poinsetta, bought in the open market in this City, were analyzed by us with the following results:

Alcohol	None
Preservatives	None
Saccharin	None
Solid matter	9.55

This drink contains, so far as we are able to ascertain, nothing contrary to either the prohibition or the food laws.

Respectfully submitted,

THE BROWN LABORATORY, INC.,
Per LUCIUS P. BROWN, *President.*

14 (For Exhibit "A," "C" the same annexed to the declaration.)

EXHIBIT "B."

Mississippi State Chemical Laboratory,
Agricultural College, Mississippi.

W. F. Hand, State Chemist.

Analysis No. 15289.

Analysis of Poinsetta.

Received from Yochim Brothers.
Address: 3028-3033 Chippewa St., New Orleans, La.

Results.

A sample of Poinsetta submitted to us by Messrs. Yochim Brothers of New Orleans, La., has been examined, and we find it to be non-alcoholic.

(Signed) W. F. HAND,
State Chemist.

Kindly give the number when referring to this analysis?

Judgment.

THE PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

Be it remembered that this day came on to be heard the above entitled cause in pursuance of an agreement of all parties, the Judge sitting by consent as both judge and jury, the pleadings having been read and the agreed statement of facts introduced, and the court having considered the same, and being of the opinion that the plaintiff is not entitled to recover, but defendant shall go hence without day and recover of the plaintiff all costs in this behalf to be taxed, wherefore it is hereby ordered and adjudged and decreed that said defendant, C. C. Lynch, do go hence without day,
15 and do have and recover of and from the Purity Extract and Tonic Company all costs in this behalf to be taxed, for all of which let execution issue.

Motion to Set Aside Judgment.

In the Circuit Court of Hinds County, Second District, State of Mississippi.

THE PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

Now comes the Purity Extract and Tonic Company and moves the court to set aside the verdict of the jury and judgment theretofore herein entered, and to grant a new trial and for causes assign:

1st. Said verdict is contrary to the law and the evidence.

2nd. Said verdict impairs the right of plaintiff guaranteed under the federal constitution in this that it deprives plaintiff of its liberty and property without due process of law and denies to it the equal protection of the law, and furthermore in that said statutes of the State of Mississippi places upon interstate commerce an unreasonable and unlawful restraint, contrary to the federal constitution and the statutes of Congress in that behalf enacted.

3rd. Said judgment and verdict impair the right of plaintiff contrary to the Fourteenth Amendment to the federal constitution.

4th. Said Judgment constitutes an illegal regulation on interstate commerce, contrary to the statutes of Congress and the federal constitution.

5th. Said statutes of the State of Mississippi whereupon said judgment is rendered is unconstitutional and void so far as this plaintiff is concerned, in that the act here sought to be pro-
16 hibited does not fall within the police power of the State of Mississippi.

6th. Said court erred in giving said peremptory instruction to the defendant.

7th. Said court erred in refusing said peremptory instruction to the plaintiff.

8th. And for other causes to be assigned.

GREEN & GREEN.

Order Overruling Motion.

In the Circuit Court of Hinds County, Second District, State of Mississippi.

THE PURITY EXTRACT & TONIC COMPANY
vs.
C. C. LYNCH.

Be it remembered that this day came on to be heard the above entitled cause on the motion of the defendant for a new trial, and the court having considered the same and being of the opinion that the same should be overruled, that defendant be allowed his exception thereto duly taken in open court, it is hereby ordered that said motion be and the same is hereby overruled, and the defendant in open court excepted and his exception was allowed as duly taken.

In the Circuit Court of Hinds County, Second District, State of Mississippi.

PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

Be it remembered that this day came on to be heard the above entitled cause and the issue being joined and said cause being by agreement tried by the court sitting as judge and jury, there-
17 upon the pleadings being read, the issue joined, the plaintiff introduced the exhibits to all pleadings (clerk here copy) and the agreed statement of facts herein filed and read to the court, and the court having considered the same and being of opinion that the defendant should go hence and the plaintiff take nothing by its writ entered the following judgment for defendant (clerk here copy).

Whereupon plaintiff made a motion for a new trial which motion was duly overruled, to which actions of the court in rendering judgment for defendant and in overruling its motion for a new trial, the defendant then and there in open court instantly excepted and to evidence said exceptions and to make all of the foregoing exhibits and evidence a portion of the record this bill of exceptions is signed, sealed and allowed in open court this 16th day of February, 1911.

Done in open court.

W. A. HENRY, *Judge.*

Bond.

In the Circuit Court of Hinds County, Second District, State of Mississippi.

PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

Know all men by these presents that we, the Purity Extract and Tonic Company as principals, and The United States Fidelity & Casualty Company, as surety, are held and firmly bound unto C. C. Lynch for the sum of Five Hundred ($500) Dollars for the payment whereof well and truly to be made, we hereby firmly bind ourselves by these presents but upon these conditions nevertheless:

That whereas upon the 16th day of February in the above entitled cause in the above entitled court a judgment was entered adverse to the plaintiff and in favor of said defendant, at which said plaintiff feels aggrieved and from which it has prayed
18 and obtained an appeal.

Now, therefore, if this plaintiff, said Purity Extract and Tonic Company shall well and truly pay any judgment that may be against it entered in the Supreme Court of the State of Mississippi, this obligation shall be void, otherwise to remain in full force and effect.

Witness our signatures this the 22nd day of February, 1911.

PURITY EXTRACT & TONIC COMPANY,
By GREEN & GREEN,
Attorneys of Record.
UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND,
By J. F. ROBINSON,
Attorney in Fact,
By GREEN & GREEN,

Attorneys in Fact.

In the Supreme Court of the State of Mississippi.

PURITY EXTRACT & TONIC COMPANY
v.
C. C. LYNCH.

Now comes the appellee herein by Attorney and enters its appearance waiving issuance of citation, and expressly requesting that this cause be heard at the March Term 1911, and waives all provisions and rules in that behalf incident.

C. C. LYNCH,
By WILLIAMS & LANCASTER,
Attorneys.

STATE OF MISSISSIPPI,
Hinds County:

I, E. D. Fondren, Clerk of the Circuit Court of the Second District of Hinds County, Mississippi, hereby certify that the foregoing 16 pages contain a true and correct transcript of the within named cause, as the same remains on file in my office, in Raymond, Mississippi.

Witness my signature this the 28th day of February, 1911.

E. D. FONDREN,
Circuit Clerk.

19 *Judgment of the Supreme Court of Mississippi.*

15179.

PURITY EXTRACT & TONIC CO.
vs.
C. C. LYNCH.

This cause having been submitted at a former term of this Court on the record herein from the Circuit Court of Hinds County, 2nd District, and the Court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the February term, A. D. 1911, be and the same is hereby affirmed and that the appellee do have and recover of the appellant and the United States Fidelity and Guaranty Company, surety on the appeal bond the costs of this cause in this Court and in the Court below to be taxed, &c.

20 **No. 15179.**

PURITY EXTRACT & TONIC COMPANY
vs.
C. C. LYNCH.

MAYES, *C. J.:*

The appellant brought suit in the Circuit Court of Hinds County against C. C. Lynch, to recover the sum of $500 claimed to be due appellant by virtue of a contract which it had with Lynch and which he refused to pay. Appellant failed to recover judgment in the Court below, hence prosecutes this appeal.

Only a brief statement of the facts need be made. Appellant is — corporation located in the City of Chattanooga, Tennessee, and is engaged in the manufacture and sale of a beverage known as Poinsetta. Sometime in November, 1910, appellant made a contract with Lynch, under the terms of which Lynch agreed to buy Poinsetta for a period of five years from January 1, 1911. The contract stipulated that appellant should deliver the beverage to the railroad company at Chattanooga, consigned to Lynch at Jackson, Hinds

County, Mississippi. The contract further stipulated that Lynch should only have the right to sell the beverage in the County of Hinds, State of Mississippi, and Lynch contracted to pay for this exclusive privilege the sum of $500. Lynch failed to comply with his part of the contract whereupon appellant instituted this suit. The defense is that the beverage is prohibited by law from being sold in Hinds County, and since the contract is violative of the law, he claims non-liability under same.

The case is before the court on an agreed state of facts. The agreed facts state that Poinsetta contains no alcohol, preservatives, or saccharine. It is agreed that Poinsetta is sold as a beverage, and is composed of 90.45% of pure distilled water, and 9.55% of solids, all of the solids being derived from cereals in an unfermented state, and being wholesome and nutritious. But it also appears that it does contain 5.73% of malt.

The formula for making the beverage is not given, but it is agreed that in the manufacture of same, the cereals used are not treated in the same way as those used in the preparation of any malt beverage containing alcohol which will intoxicate, but the treatment of the grain is by extracting the valuable food properties and combining them with water, so that the grain is not fermented or steeped in such a way as to produce saccharine matter or alcohol; that the beverage contains none of the properties of alcoholic drink or malt drinks that would intoxicate. The primary processes employed in the production of Poinsetta has some of the elements in common with some of those employed in preparing grain for malting porter, ale,
21 or beer, etc.; but the process thereafter used in the preparation of this beverage is radically different from that used to produce ale, beer, etc.; but Poinsetta is made from malt.

It is agreed that its taste is distinct and different from any intoxicating malt or other liquor. It is agreed that it has not the appearance or odor of intoxicating liquor, and cannot be employed as a subterfuge.

In the discussion of this case, we start out with the admission of counsel that this drink is a beverage containing no alcohol, it is true, but containing 5.73% of malt, and we unhesitatingly pronounce the beverage a malt liquor. It can be nothing else.

The Legislative Acts of 1908, page 116, Sec. 1, prohibit the sale in this state of any vinous, alcoholic, malt, intoxicating or spirituous liquors. The sale of malt liquor is prohibited whether in fact it intoxicates or not. In the cases of Fuller vs. City of Jackson, 52 Sou. Rep. 876; Reyfelt v. State, 73 Miss. 415, and Edwards vs. City of Gulfport, 49 Sou. Rep. 620, it was held that where the statute prohibited the sale of a certain named class of liquors as intoxicating liquors, such liquors could not be lawfully sold, though in fact they were not intoxicants. Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such is prohibited from being sold in this state. The prohibition laws cannot be made effective unless it excludes all subterfuges.

It is argued by counsel for appellant that if the legislative act in question is intended to shut off the sale of any beverage containing

no alcohol which is not in itself harmful, then the act is unconstitutional and beyond the police power of the state. In so far as this question is concerned, we have settled it in the case of Fuller vs. City of Jackson, 52 Sou. Rep. 876. In this connection we can do no better than to quote the language of Chief Justice Dowdell, in the case of Elder vs. State, 50 Sou. Rep. 370:

"If it should be conceded that the articles, the sale of which is prohibited by the act, are not in themselves injurious to health or morals, still there can be no doubt, under former decisions of this court, that to prohibit thesale of the articles mentioned is not without legislative competency. To prohibit the sale of malt liquors is undeniably within the police power of the state. The exercise of this power by the Legislature, in the prohibition of the sale of malt liquor, is upon the idea of the conservation of public morals. To this end it must logically follow that it — equally within the police power of the state, through its lawmakers, to enact any and all laws in their wisdom necessary to prevent any evasion of the primary purpose. If, in the wisdom of the Legislature, in order more thoroughly to prohibit the sale of malt liquor, which is known to be an intoxicant, and to safeguard against evasions of such law, it should be deemed necessary to prohibit the sale of any and all beverages containing as an ingredient 'maltose' a known constituent of malt liquor, we are unable to see why such legislation would not reasonably come within the exercise of the State's police power."

We are aware of the fact that the language of Chief Justice Dowdell, speaking for the Alabama Court, was afterwards receded from by a majority of the court, but the principle declared by him has been followed by other courts and concurred in by this court in the Fuller case referred to above.

22 In the case of Pennell vs. State, 123 N. W., 115, it is held that "In enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves the subject of police regulation where the inclusion of such acts is necessary in the opinion of the Legislature to make the police regulation effective, as in Booth v. Illinois, 184 U. S. 425. * * * This principle has been applied to liquor laws quite uniformly and with reference to statutes substantially like ours which prohibited the sale, not only of intoxicants, but of those non-intoxicating beverages, the sale of which might easily be made a cover for the sale of intoxicants." See also Luther v. State, 20 L. R. A. 1146, and State v. Fargo Bottling Works, 124 N. W., 387.

The police power of the state undoubtedly has its limitations. But those limitations have not been reached when the State law is only made broad enough to make its prohibitory laws effective and include in its provisions frauds, disguises, subterfuges, attempted evasions, or beverages easily used as subterfuges and known to be the hand maidens of intoxicating beverages.

Affirmed.

23 In the Supreme Court of the State of Mississippi, First District, October Term, A. D. 1911.

PURITY EXTRACT & TONIC COMPANY et al.
v.
C. C. LYNCH.

Petition for Writ of Error.

Now comes the Purity Extract and Tonic Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Tennessee, having its residence and legal domicile in the City of Chattanooga, State of Tennessee, and the United States Fidelity and Guaranty Company, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Maryland, and being lawfully authorized to do a surety business in the State of Mississippi, and respectfully represent:

1. That heretofore on the 16th day of October A. D. 1911, the Supreme Court of State of Mississippi affirmed a judgment of the Circuit Court of Hinds County, Second District, State of Mississippi, duly removed from said Circuit Court by appeal under the laws of the State of Mississippi to said Supreme Court, and that said Supreme Court was the highest Court of law having jurisdiction of said cause under the laws of said State.

2. In said cause said appellant there, and plaintiff in error here, said Purity Extract and Tonic Company, duly and regularly set up and claimed that its certain rights be enforced by said court under and by virtue of Article 1, Section 8, subdivision 3, of the Constitution of the United States, wherein Congress was given the right to regulate commerce with foreign nations and among the several States, and also under the Fourteenth Amendment to said Constitution, Section 1, whereby no State was permitted to make or

24 enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws, and also claimed rights under the several statutes passed by Congress in virtue of said constitutional provisions.

3. That said Supreme Court of the State of Mississippi, being the highest court of law and equity of said State, then and there denied the rights and claims of your petitioner, said Purity Extract and Tonic Company, both the rights and claims given under sections of the Constitution of the United States and its amendments, as well as under the several acts of Congress passed, after each and all of said claims and rights had been first denied by said Circuit Court of Hinds County, Second District, the court of original jurisdiction, wherefrom said cause had been lawfully transmitted by appeal to said Supreme Court, and rendered judgment against it, and said United States Fidelity and Guaranty Company, the surety on its appeal bond.

4. That then and there said cause being in the said Supreme Court of the State of Mississippi, the said rights ans claims of your petitioner, both under the Constitution of the United States and under said statutes, were duly set up and insisted upon by petitioner, said Purity Extract and Tonic Company, as well as they had been theretofore set up and insisted upon in said Circuit Court of Hinds County Second District in said cause, and that then and there said Supreme Court of the State of Mississippi in this cause rendered a judgment there and then denying, as alleged by your petitioner, said Purity Extract and Tonic Company, its rights set up and sustaining as valid certain legislation of the State of Mississippi which your petitioner averred and claimed to be in contravention of said several provisions of the Federal Constitution hereinbefore recited and wholly unauthorized by Congress in virtue of the Wilson Bill, and that said Supreme Court of the State of Mississippi, then and there, sustained the validity of said statutes and denied the rights and claims of your petitioner set up under and in virtue of the provisions in the Federal Constitution and the statutes passed in pursuance thereof, and that then and there denied to your petitioner its rights claimed in this regard, and rendered judgment against said petitioner and said surety on said appeal bond, and petitioners say that grievous error hath therein happened, greatly to their detriment, and that petitioners are entitled by law to a writ of error to the Supreme Court of the State of Mississippi from the Supreme Court of the United States to correct said errors therein committed as hereinbefore shown.

Wherefore, your petitioners pray that this Court grant an order allowing said petitioners to prosecute a writ of error to the Supreme Court of the United States, under and by virtue of the laws in the behalf made and provided, and also that an order be made fixing the amount of the bond that plaintiffs in error shall be required to give upon the said writ of error, and that upon the giving of the same all further proceedings shall be stayed and suspended until the termination of said writ of error by said Supreme Court of the United States.

And as in duty bound, etc.

MARCELLUS GREEN,
GARNER W. GREEN,
MARCELLUS GREEN, JR.,
Attorneys.

In the Supreme Court of the State of Mississippi, First District, October Term, A. D. 1911.

PURITY EXTRACT AND TONIC COMPANY et al.
v.
C. C. LYNCH.

Be it remembered that this day the petition of Purity Extract and Tonic Company et al. came on for hearing and it appearing that the said Purity Extract and Tonic Company did claim rights in this

cause in said Court under the Constitution of the United States and the Statutes of the United States, and that said rights were
26 claimed under the Commerce Clause, Article 1, Section 8, Clause 3, and under Article 1, Section 10, Clause 1, and under those clauses of the Fourteenth Amendment requiring the equal protection of the law and the denial of the right of any State to deprive any person of life, liberty or property without due process of law, and the Statutes of Congress in that behalf incident, and that said claim and right of said Purity Extract and Tonic Company was by said Court denied and that said Supreme Court of the State of Mississippi, is the highest State Court having jurisdiction of said controversy and that said controversy presented for consideration questions arising under the constitution and laws of the United States and that the same were denied by the said Supreme Court of the State of Mississippi, and that the said Purity Extract and Tonic Company and United States Fidelity and Guaranty Company, the surety on its appeal bond have prayed for a writ of error from the Supreme Court of the United States, and that the said Purity Extract and Tonic Company and said surety are entitled to have said cause removed on the said writ to the said Supreme Court and then and there to have the writ of error issued and that the amount of the said bond ought to be in the sum of $1,000.00 to be approved by the Clerk of the Supreme Court of the State of Mississippi, wherefore let a writ of error issue in accordance with law and upon the said Purity Extract and Tonic Company and said United States Fidelity and Guaranty Company entering into a bond duly conditioned according to law in the penal sum of $1,000.00.

Witness my signature and the seal of said Court this 19th day of October A. D. 1911.

ROBERT B. MAYES,
Chief Justice Supreme Court of Mississippi.

27 & 28 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to C. C. Lynch:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the Capitol in the City of Washington, D. C., within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Mississippi, wherein Purity Extract & Tonic Company and the United States Fidelity and Guaranty Company, plaintiffs are plaintiffs in error and you are defendant in error to show cause, if any you can, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, this — day of October A. D. 1911.

——— ———,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

(Copy.)

29 In the Supreme Court of the State of Mississippi, First District, October Term, A. D. 1911.

PURITY EXTRACT AND TONIC COMPANY et al.
v.
C. C. LYNCH.

Know all men by these presents, that we, Purity Extract and Tonic Company and United States Fidelity and Guaranty Company as principals, and the American Bonding Company as surety, are held and firmly bound unto the said C. C. Lynch, defendant in error in the sum of One Thousand Dollars, to be well and truly paid, for which we bind ourselves our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 23rd day of October A. D. 1911. Whereas the above named plaintiffs in error have sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause rendered by the Supreme Court of the State of Mississippi.

Now, therefore, the condition of this obligation is such that if the above named Purity Extract and Tonic Company and United States Fidelity and Guaranty Company shall prosecute the said writ of error to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our signatures the day and year above written.

PURITY EXTRACT & TONIC COMPANY,
By GREEN & GREEN, *Att'ys.*
UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD.,
By J. F. ROBINSON, *Att'y in Fact;*
By GREEN & GREEN, *Att'ys.*
AMERICAN BONDING CO.,
By J. C. HOOD, *Att'y in Fact.*

I approve the foregoing bond this 23rd day of October A. D. 1911.

GEO. C. MYERS,
Clerk of the Supreme Court of Mississippi.

30 In the Supreme Court of the State of Mississippi, First District, October Term, A. D. 1911.

PURITY EXTRACT & TONIC COMPANY et al.
v.
C. C. LYNCH.

Assignment of Errors.

Now comes the Purity Extract & Tonic Company and The United States Fidelity & Guaranty Company of Baltimore, Maryland, plaintiffs in error, and respectfully represent unto the court that upon the trial of the above entitled cause in the Supreme Court of the State of Mississippi, divers, grevious and prejudicial errors were committed to the detriment of plaintiffs in error and for said errors assign:

(1) The Supreme Court of the State of Mississippi erred in affirming the judgment for the defendant in error and in not reversing the same and entering judgment for the plaintiff in error.

(2) Under the interpretation of the Supreme Court of the State of Mississippi of Section one of Chapter 115, of the Statute of 1908, of Mississippi, approved, February 19th 1908, (Laws 1908, P. 116), it was decided that the contract sued on was forbidden by the said Statutes and was void thereunder, when said contract related to interstate commerce in Mississippi, solely, in Poinsetta, a wholesome and nutritious beverage, manufactured in Tennessee, at a large expense, under large investment, not injurious to health and not a distilled fermented, or other intoxicating liquor or liquid; and erred in not holding said contract valid, and the said Statute so interpreted — violative of the Constitution of the United States, in this:

31 (*a*) Article 1 Section 8, Subdivision 3, providing:

"The Congress shall have power to regulate commerce with foreign nations, and among the several states and with "Indian Tribes;" and

(*b*) By impairing the obligation of said contract by said Statute, so interpreted, contrary to Article 1, Section 10, subdivision 1; and

(*c*) The XIV Amendment thereto, providing; Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Law."

And for failing to give effect to said provisions of the said Constitution and each of them; and in holding that in pursuance of said Statute the State of Mississippi could:

(*a*) Regulate Interstate Commerce; and,

(*b*) Deprive plaintiff in error of its liberty and property without due process of law.

(3) Said Supreme Court of the State of Mississippi erred in

holding said Statute — so far as it regulated interstate commerce in Poinsetta.

(4) The said Supreme Court of the State of Mississippi erred in holding said Statute valid so far as it deprived this plaintiff in error of its liberty and property in and to and with reference to Poinsetta and to its sale under this contract.

(5) Said Supreme Court erred in holding that the right to declare said contract void in virtue of the said Statute existed under the police power of the State of Mississippi.

(6) Said Supreme Court erred in holding that the said State of Mississippi had the power, under its police power, to annul said contract; and such holding was an impairment of the obligation of the said contract contrary to Article 1, Section 10, Subdivision 1 and a violation of the 14th amendment to said Constitution.

(7) Said Statute of the State of Mississippi above mentioned as far as it attempts to avoid the contract herein sued upon is beyond the power of the State of Mississippi to enforce or enact.

32 Wherefore said plaintiff in error prays that the above assigned errors may be inquired of by this court and the same corrected in accordance with law.

MARCELLUS GREEN.
G. W. GREEN.
MARCELLUS GREEN, JR.

33 UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the Supreme Court of the State of Mississippi, before you, or some of you, being the highest Court of law or equity of the said State in which a decision of the said suit between the said Purity Extract and Tonic Company and the United States Fidelity and Guaranty Company, plaintiffs and plaintiffs in error, and C. C. Lynch, defendant and defendant in error wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right title and privilege specially set up and claimed under the said clause of the said Constitution, a manifest error hath happened to the great damage of the said Purity Extract and Tonic Company and the United States Fidelity and Guaranty Company, plaintiffs in error as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seals distinctly and openly, you send the record and all the proceedings aforesaid, with all things concerning the same to the said Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the — day of ——— next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid,

being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 23 day of October A. D. 1911.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk U. S. Circuit Court
Southern District of Mississippi.

34 In the Supreme Court of the State of Mississippi, County of Hinds.

I, George C. Myers Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last, and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify the foregoing are full true and correct copies of all the papers each and all of them, constituting the record in the said Supreme Court of Mississippi, in the case of Purity Extract & Tonic Company Versus C. C. Lynch, including the judgment of said Supreme Court and the opinion thereof in said cause, all of which are now on file in my office, also copies of the petition for writ of error, fiat of Chief Justice granting same, the appeal bond to United States Supreme Court, assignments of error, and writ of error.

Given under my hand and seal of said Supreme Court of Mississippi, at Jackson, in the State of Mississippi, this the 2nd day of November A. D. 1911.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

35 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to C. C. Lynch:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the Capitol in the City of Washington, D. C. within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Mississippi, wherein Purity Extract & Tonic Company and the United States Fidelity and Guaranty Company, plaintiffs are plaintiffs in error and you are defendant in error to show cause, if any you can why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 23 day of October A. D. 1911.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk of the Circuit Court of the United States
for the Southern District of Mississippi.

I acknowledge service of the above citation on this 25th Oct., 1911.

C. C. LYNCH.

Witness:
GEO. D. LANCASTER.

Endorsed on cover: File No. 22,931. Mississippi Supreme Court. Term No. 855. Purity Extract & Tonic Company and The United States Fidelity and Guaranty Company, plaintiffs in error, vs. C. C. Lynch. Filed November 11th, 1911. File No. 22,931.

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Office Supreme Court, U
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JAMES H. McKENN

No. 464.

—IN THE—

Supreme Court of the United States

October Term, 1911.

PURITY EXTRACT & TONIC COMPANY, *et al.*,
Plaintiffs in Error,

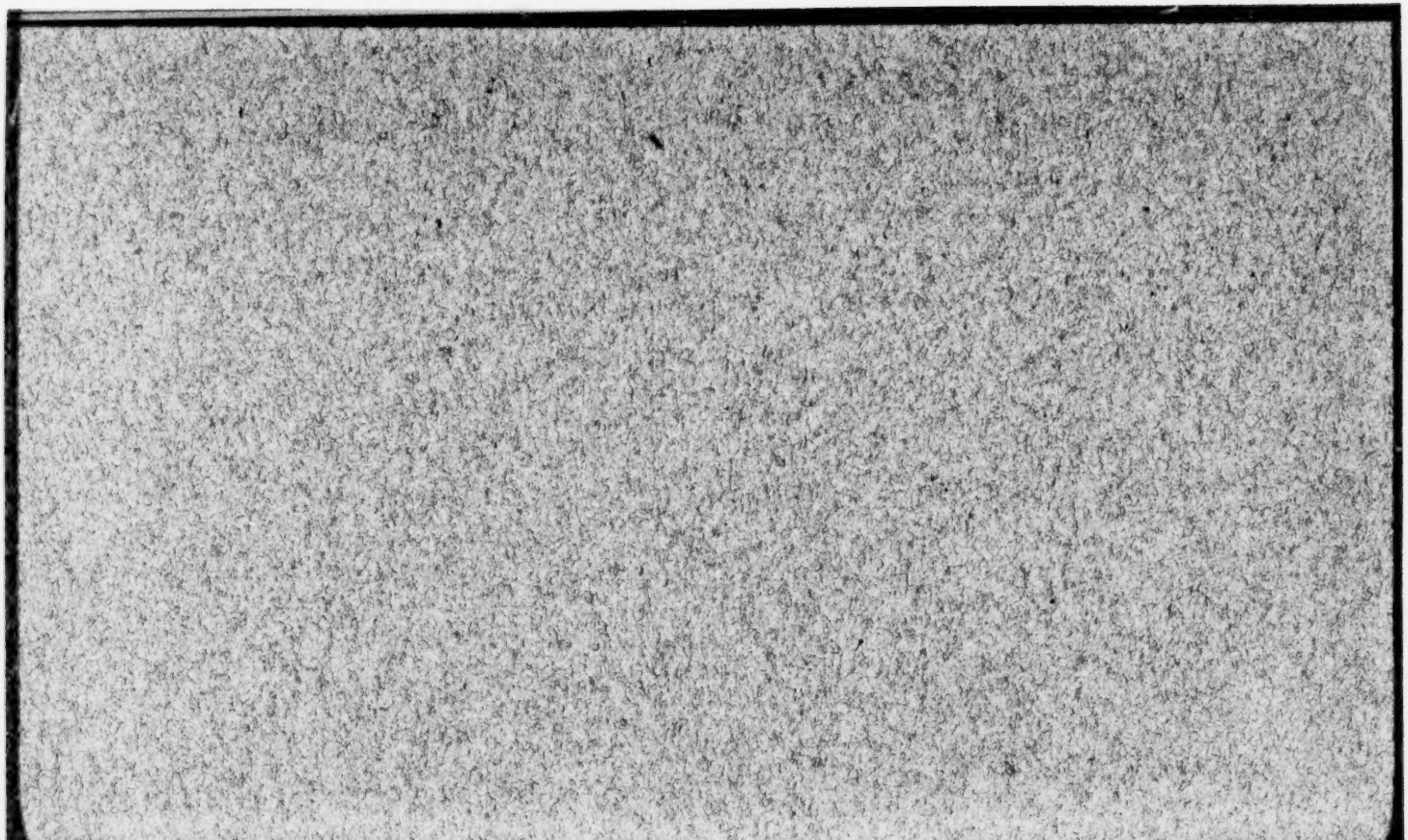
v.

C. C. LYNCH, Defendant in Error.

BRIEF.

MARCELLUS GREEN,
G. W. GREEN,
MARCELLUS GREEN, JR.,
Attorneys for Plaintiffs in Error.

Tucker Printing House, Jackson, Miss.



In the Supreme Court of the United States

October Term, 1911.

PURITY EXTRACT & TONIC COMPANY, *et al.*,
Plaintiffs in Error,

v.

C. C. LYNCH, Defendant in Error.

STATEMENT OF CASE.

This writ of error presents on an agreed state of facts the constitutionality of chapter 113, section 1, Acts of Mississippi, 1908, providing "that it shall be unlawful for any person, firm, corporation, or association within this state to manufacture, to sell or barter, or give away to induce trade, or keep for sale, or barter, or to be given away to induce trade, any vinous, alcoholic, malt, intoxicating or spirituous liquors or intoxicating bitters or other drinks, which, if drunk to excess, will produce intoxication" as construed by the Mississippi Supreme Court.

The contract condemned related to Poinsetta, a proprietary drink, and as to which it was admitted:

1. That the contract, giving substantially a county right, was entered into in good faith, and defendant in error is anxious to perform provided same does not violate the statute of the State.

2. Poinsetta x x x is composed of 90.45 per cent of pure distilled water, and of 9.55 per cent solids, but all of which solids are derived from cereals and are in an unfermented state, and are wholesome and nutritious. It contains no alcohol whatsoever, neither does it contain saccharine matter. A

correct analysis is attached hereto. It contains 5.73 per cent of malt and is sold as a beverage.

3. Said beverage is manufactured by plaintiff at Chattanooga, Tennessee, under a formula obtained from German scientists of whom plaintiff for value purchased the exclusive right to manufacture and sell said beverage in the United States. The formula thereof and the process of making the same under the contract constitute trade secrets and cannot be disclosed, but it is admitted that the methods used in manufacturing said beverage are wholesome and that the same is compounded in a sanitary establishment, with sanitary methods.

4. It is agreed that in the manufacture thereof the cereals employed are not treated in the same way as are those used in the preparation of any malt beverage containing alcohol and which are in any way intoxicating, but under said formula the treatment of said grain is that in extracting the valuable food properties therefrom and in combining them with said water that said grain is not either so fermented or steeped in water or other solvent as to produce saccharine matter or alcohol, and that said beverage, when so prepared containing said solids derived from said grain, contains none of the properties of any alcoholic drink, nor of any malt drink that will intoxicate, but, while technically speaking the primary process employed in the production of Poinsetta may have some few elements in common with those employed in preparing grain in the first stages for malting for porter, ale, or beer, still the process thereafter used in the preparation of Poinsetta are so radically and vitally different that they do not bring into said beverage either saccharine matter or alcohol, but are effectual in integrating into said beverage to a large per cent the food values contained in unfermented grain.

5. Poinsetta contains no alcohol. It contains no saccharine matter. It contains some portions of barley, malt, hops, and other cereals, but neither fermented nor treated so as to produce any of the

properties of any malt liquor which will produce intoxication.

Poinsetta is guaranteed under the pure food laws of Congress and no matter to what extent taken will not produce intoxication.

6. Its taste is distinctive and different from any intoxicating malt liquor or any other liquor. Its appearance is such that it would not probably be mistaken for any intoxicating liquor. It has a distinctive odor dissimilar from that of any intoxicating drink, and cannot be employed as a subterfuge for the sale of beer because it is bottled in a distinctive way and its name blown in each bottle which contains the beverage.

7. Poinsetta is put up in bottles at Chattanooga, Tennessee, and is shipped in bottles, each separate and apart from the other, placed in a case in which they are in no way attached, and which is done merely to prevent breakage of the bottles in transit. The case is not fastened with nails or other device but merely closed. The bottles so contained are shipped in interstate commerce from Chattanooga, Tennessee, and are to be received under the contract by the consignee in Mississippi in the same condition as when bottled, and are to be sold as each several package. There is to be no retail sale under said right by said Lynch in the State of Mississippi, but all shipments are to be made direct either to said Lynch, or to other persons who shall desire to purchase said drink, and are to be delivered to said purchasers of said bottles in precisely the same shape as prepared in Tennessee, and said Poinsetta is still contained in the original package at the time it will be offered for sale in Mississippi by the purchaser thereof in the original package which was sent from Tennessee through Alabama into Mississippi.

8. The United States Government does not treat Poinsetta as within the class of intoxicating liquors and does not require anything to be done with reference to its sale.

9. A large amount of capital has been invested in the plant of plaintiff where this beverage is manufactured and the right to manufacture and sell it in the United States was purchased at large cost and a business has been built up at a great expense and the right to sell it in Mississippi is of great value and should it be denied, irreparable damage would be done.

10. That the State of Mississippi through the State Chemist has analyzed Poinsetta and a true copy of his analysis is hereto attached and therein it is shown that it does not contain any alcohol. The same being Exhibit "B".

Exhibit "B".

Mississippi State Chemical Laboratory.
Agricultural College, Mississippi.

W. F. Hand,
State Chemist.

Analysis No. 15,289.
Analysis of Poinsetta.
Received from Yochim Brothers.
Address, 3029-3033 Chippewa St., New Orleans, La.

Results.

A sample of *Poinsetta submitted to us by Messrs. Yochim Brothers of New Orleans, La., has been examined, and we find it to be non-alcoholic.*

(Signed) *W. F. Hand,*
State Chemist.

Kindly give the *number* when referring to this analysis.

Plaintiffs in error made with defendants in error, contract as follows:

"THIS CONTRACT made and entered into this 23rd day of November, nineteen hundred and ten, by and between the PURITY EXTRACT & TONIC

COMPANY, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Tennessee, and having its residence and legal domicile therein, and hereinafter for convenience called the Seller, and C. C. Lynch, a resident and citizen of the City of Chattanooga, State of Tennessee, and hereafter for convenience called the Buyer.

"Said seller contracts and agrees to sell upon the terms and price shown upon the list hereunto annexed and said buyer contracts and agrees to buy of and from the seller that commodity called Poinsetta for and during a period of five years from and after January 1st, 1911, and the seller agrees to deliver the same, properly boxed, to the railroad company at Chattanooga, Tennessee, for shipment to Jackson, Mississippi, to buyer f. o. b. cars, Chattanooga, Tennessee.

"Said buyer contracts and agrees to and with said seller that said Poinsetta will be sold only in the county of Hinds, State of Mississippi, and to sell and dispose of the same within said county said buyer will use all of his best efforts and give his time to the sale thereof.

"Said seller contracts and agrees that the right so to sell and dispose of said Poinsetta in said county of Hinds for and during the period of five years from and after said date will be vested in said buyer exclusively, and that he and he alone shall have the right to sell the same within the limits of said county.

"Said buyer contracts and agrees to pay the seller hereunder within five days from and after the delivery of this contract, the sum of five hundred ($500) dollars for said exclusive right to sell Poinsetta within said county of Hinds during said period of five years.

"The price list is marked Exhibit 'A' hereto and the price mentioned shall govern during the entire time that this contract shall be in force.

"Should said buyer wish at the expiration to renew this contract, he can do so upon the payment

of five hundred ($500.00) dollars additional but said seller shall have the right at that time to alter the price list so that it will conform to the price list then current."

Thereupon default having been made in the payment of the five hundred ($500.00) dollars, suit was instituted in the Circuit Court of Hinds County, Second District, therein, by plaintiff in error, whereupon defendant in error set up the statute of the State of Mississippi as declaring said contract illegal, to which plaintiff in error replied that,

1. If said statutes under said agreed statement of facts rendered said contract illegal, such statutes violated the fourteenth amendment in that it deprived plaintiff in error of its liberty and property, and furthermore,

2. Violated the Commerce Clause of the Federal Constitution.

Upon the issues thus joined, the cause proceeded and judgment was rendered for defendant and this judgment was affirmed by the Supreme Court, and thereupon Mr. Chief Justice Mayes granted this Writ of Error and the cause is now here. The Attorney General of Mississippi was a party to the agreed statement of facts and appeared in the Supreme Court in this cause.

POINTS AND AUTHORITIES.

I.

Chapter 113, section 1, as interpreted by the Supreme Court of the State of Mississippi in so far as it regulates the movement of Poinsetta in interstate commerce, violates the Federal Constitution. *Leisy v. Hardin*, 135 U. S., 100; *Bowman v. Chicago & Northwestern Railway*, 125 U. S., 465; *in re Rahrer*, 140 U. S., 35; *Brennan v. Titusville*, 153 U. S., 289; *Scott v. Donald*, 165 U. S., 95; *Vance v. Vandercock*, 170 U. S., 441; *Rhodes v. Iowa*, 170 U. S., 411; *Schollenberger v. Pennsylvania*, 171 U. S., 1; *Telegraph*

Co. v. Philadelphia, 190 U. S., 162; *American Express Co. v. Iowa*, 196 U. S., 133; *Brewing Co. v. Crenshaw*, 198 U. S., 21; *Cook v. Marshall County*, 196 U. S., 261; *Foppiano v. Speed*, 199 U. S., 504; *South Carolina v. United States*, 199 U. S., 461; *Rearick v. Pennsylvania*, 203 U. S., 508; *Express Co. v. Kentucky*, 214 U. S., 218.

II.

Said statute as interpreted by the Supreme Court of the State of Mississippi, in so far as it deprives plaintiff in error of the right to sell Poinsetta, is in conflict with the fourteenth amendment in that thereby it attempts to deprive plaintiff in error of its property and liberty without due process of law. *Lochner v. N. Y.*, 198 U. S., 56; *Harper v. California*, 155 U. S., 662; *Hudson Water Co. v. McCarter*, 209 U. S., 355; *Welch v. Swasey*, 214 U. S., 103.

ARGUMENT.

I.

Chapter* 113, *section* 1, *as interpreted by the Supreme Court of the State of Mississippi, in so far as it regulates the movement of Poinsetta in inter-state commerce, violates the Federal Constitution.

Article one, section eight, clause three, of the Federal Constitution, provides,

"The Congress shall have power

"To regulate commerce with foreign nations, among the several states, and with Indian Tribes."

Congress has the exclusive power over inter-state commerce, which embraces not only the right of importation, but as defined by the great Chief Justice, in *Brown v. Maryland*, 12 Wheaton, page 447, the right to sell which,

"Is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing,

then, as importation itself. It must be considered as a component part of the power to regulate commerce."

This decision has become integrated into all the subsequent jurisprudence upon the subject; accurately and authoritatively defining its limits. The State is powerless to regulate the terms and conditions upon which commodities moving in interstate commerce shall be admitted, or after admission be sold in original packages except in so far as permitted by Congress.

Conceding, for argument's sake, Poinsetta to be a liquor, we submit the proposition that no State had the absolute right to prohibit the sale of an original package moving in interstate commerce was settled in favor of plaintiff in error by the decision of *Leisy v. Hardin*, 34 Law Ed., 132, 134 U. S., 108. The conclusion as reached in that case was as follows:

"The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in *Bowman v. Chicago & N. W. R. Co., supra*, they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the

power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, but its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create. Undoubtedly there is difficulty in drawing the line between the municipal powers of one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson in *Gibbons v. Ogden*, 22 U. S. 9, Wheat. 1, 238 (6:23, 80), in 'a frank and candid co-operation for the general good.' "

There was, by the statute in question, an absolute prohibition of the right to sell, *under any and all circumstances*, necessarily prohibiting the right to sell Poinsetta in original packages, which were made in the State of Tennessee and delivered to the carrier addressed to the vendee in the State of Mississippi; the power of the Legislature was attempted to be extended so as that it embraced the right to sell either in original packages or in any other manner, and by reason of the fact that it made unlawful the right to sell in original packages, shipped in interstate commerce, into the State of Mississippi, the statute violates the Constitution.

The Wilson Bill is not applicable, because the power of the State was only allowed to attach thereby to "all fermented, distilled, or other intoxicating liquors." The Wilson Bill only extended the police power until it embraced fermented, distilled or other intoxicating liquors, and unless Poinsetta can be placed in this category, the doctrines of *Leisy v. Hardin*, 135 U. S. 289, are still applicable.

It is agreed that Poinsetta is not fermented but that the solids therein are in an "unfermented" state. Moreover, it is not distilled, nor is it an intoxicating liquor or liquid, so we submit that, as to it, the Wilson Bill has no application.

In 17 Am. and Eng. Enc. L. 12th Ed. 197, intoxicating liquor is defined:

"The term, 'intoxicating liquors,' is frequently defined by the statutes regulating or prohibiting the traffic in intoxicating liquors, and when this is done no question can arise as to what particular liquors or compounds thereof or other substances are intoxicating. In its usual acceptation the term means those liquors the use of which in such quantities as may be practically drunk is ordinarily or commonly attended with intoxication, either entire, or partial."

Prior to the Wilson Bill there could have been no question but that intoxicating liquors could have been brought into the State of Mississippi in original packages, and there sold by the importers, and that to prohibit said sale, said State would have been powerless. Now, Poinsetta, not being intoxicating, and being a commodity recognized by the Federal Government, can, we submit, move in precisely the same way as do other articles of commerce, not within the prescription of the Wilson Bill, and hence the right to sell, in original packages, exists in the State of Mississippi, and the consideration for Lynch's promise was good and valid, and the statute attempting to make it unlawful, unconstitutional.

This Court is careful to see that the states do not transgress the permission contained in the Wilson Bill and has, upon repeated occasions, condemned statutes attempting to extend unconstitutionally the State's power. *Rhodes v. Iowa*, 170 U. S. 412.

Under the Wilson Bill the state can only legislate where it regulates a sale of fermented or distilled or other intoxicating liquors or liquids. The intoxicating quality is a *sine qua non* to the accrual of the state's power in the premises. Each word in

a statute must be given effect. Here, by the apt use of the word, "other," the quality of intoxication has been extended back so as to reach and qualify the prior words, "fermented," or "distilled." In fine, the intoxicating quality is that alone to which Congress extended the state's power, and in order to sustain the exercise thereof, the essential principle of intoxication must inhere in the liquor or liquid which is to be forbidden to be sold in its original package by the state. In Poinsetta the second stage in the production of the intoxication principle has been reached; that is, the starch has not been converted into sugar so that it, in turn, might be transformed, through fermentation, into alcohol. The laws of chemistry are invariable, and where starch has not been transformed into saccharine matter, no alcoholic principle can be present and the certificate of the Chemist of the State of Mississippi, was, to the effect, that Poinsetta was *non-alcoholic*.

That Poinsetta is an article of commerce is admitted by the record, and especially do we direct the attention of the Court to the fact that the United States Government does not treat Poinsetta as within the class of intoxicating liquors, or require anything to be done with reference to its sale.

Turning to the decisions of the Court in *Express Co. v. Kentucky*, 214 U. S. 18, 52 L. Ed., 972, the lamented Justice Brewer thus said:

"Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of commerce. *Licenses Cases*, 5 How. 504, 577, 12 L. ed. 256, 289; *Leisy v. Hardin*, 135 U. S. 100-110, 34 L. ed. 128-132, 3 Inters, Com. Rep. 36, Sup. Ct. Rep. 681.

"In *Vance v. W. A. Vandercock Co.* 170 U. S. 438, 42 L. ed., 1100, 1103, 18 Sup. Ct. Rep. 674, 676, Mr. Justice White, delivering the opinion of the Court, said:

" 'Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate com-

merce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.'

"That the transportion is not complete until delivery to the consignee is also settled.

"In *Rhodes v. Iowa*, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664-669, it was held that the Wilson Act (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177) 'was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee.'

"This legislation is in the exercise of the police power,—a power which, generally speaking, belongs to the state,—and is an attempt, in virtue of that power, to directly regulate commerce; but, in case of conflict between the powers claimed by the state and those which belong exclusively to Congress, the former must yield, for the Constitution of the United States and the laws made in pursuance thereof, are 'the supreme law of the land.'

" 'Section 5258 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3564) provides:

" 'Every railroad company in the United States * * * * is authorized to carry upon and over its road * * * * all passengers * * * * freight, and property on their way from any state to another state, and to receive compensation therefor.' *New Orleans Gaslight Co. v. Louisiana Light and H. P. and Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Wabash St. L. and P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

"In *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 334, L. ed. 230, 234, 28 Sup. Ct. Rep. 121, 123, it was declared 'that any exercise of state author-

ity, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution.'

"In *Adams Express Co. v. Kentucky*, 206 U. S. 129, 135, 51 L. ed. 987, 991, 27 Sup. Ct. Rep. 606, 607, it was said:

" 'The testimony showed that the package, containing a gallon of whiskey, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was, therefore, one of interstate commerce, and within the enclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such intesrtate commerce. This is hardly questioned by the Court of Appeals, and is beyond dispute under the decisions of this Court.'

"Clearly, within the cases above cited, the statute before us, as applied to transportation from state to state, cannot be sustained."

In *Rearick v. Pennsylvania*, 203 U. S. 508, 51 L. ed. 296, a question arose as to the right of a state to tax an agent, and the agreed statement of facts showed:

"An Ohio corporation employed an agent to solicit in Sunbury retail orders to the company for groceries. When the company had received a large number of such orders, it filled them at its place of business in Columbus, Ohio, but in putting up the objects of the several orders in distinct packages, and forwarding them to the defendant by rail, addressed to him 'for A. B.,' the customer, with the number of the order also on the package, for further identification. The company ultimately kept the orders, but it kept no book accounts with the customers, looking only to the defendant. The defendant alone had authority to receive the goods from the railroad, and when he received them he delivered them, as was his duty, to the customers, for cash paid to him. He then sent the money to the corporation. The customer had the right to refuse the goods if not equal to the sample

shown to him when he gave the order. In that, or other cases of non-delivery, the defendant returned the goods to Columbus. No shipments were made to the defendant except to fill such orders, and no deliveries were made by him except to the parties named on the packages. In the case of brooms, they were tagged and marked like the other articles, according to the number ordered, but they then were tied together into bundles of about a dozen, wrapped up conveniently for shipment. The defendant had no license, but relied upon the invalidity of the ordinance, as we have said.

"If the acts of the plaintiff in error were done in the course of commerce between several states, the law is established that his request for a ruling was right, and that he should have been discharged. *Robbins v. Taxing District*, 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed., 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229. It will be seen from the insertion of the statement concerning the brooms that a ground relied upon by the prosecution to avoid that conclusion was that the goods, or at least this part of them were not in the original packages when delivered, and that, therefore, the case did not fall within the decisions last cited, but rather with *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; and *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233."

Furthermore, in that case, the Court said:

"Commerce among the several states 'is a practical conception, not drawn from the witty diversities (*Yaites v. Gough*, Yelv. 33) of the law of sales. *Swift and Co. v. United States*, 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276. The brooms were specifically appropriated to specific con-

tracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, whatever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce. In *Brennan v. Titusville, supra*, pictures were sold by sample, as the brooms were here, and although the pictures were consigned to the purchasers directly, the railroad collecting the price, there was no discussion of the question whether the title had passed.

In this case we are not driven to question in any way whether each bottle of Poinsetta as it is now shipped, constitutes an original package, because the statute of Mississippi, in express terms, prohibits the sale under any and all circumstances; wholly without reference to whether or not the sale be of the original package or not.

But, we submit, that each bottle, so shipped, is an original package; there was no subterfuge adopted in so shipping said bottles as all goods, in a similar situation, of a similar character, now move in commerce among the several states in the identical manner pointed out here. This mode is not an expedient, an invention devised, at large expense, as a means whereunder a fraud could be perpetrated upon the police power of the state. Each bottle contained that which was intended for delivery to an individual, assuming that the owner desired to sell the bottles by retail and not to sell the entire case (which was prohibited also). Each bottle had its individuality preserved intact, and was moving in interstate commerce as an individual package, because of the demand made by the consumer, in response to the teachings incident to present day civilization; that the label represents the responsibility of the manufacturer and that the food and drink may be prepared in packages for consumption in such wise as to prevent either contamination or opportunity for adulteration by an intermediary. The sole requisite to make an article of commerce an original package, is that it should be ordinarily employed in good faith as a means for mov-

ing that commodity in interstate transportation. *Austin v. Tennessee*, 179 U. S. 343.

In *Cook v. Marshall County*, 196 U. S. 261, the Austin case was sought to be reviewed and this Court again divided four to four, with a concurring opinion by the present Chief Justice, who cast the dividing vote.

The concurring opinion, which constitutes the judgment of the Court is to be found at page 275, where it is said:

"The only difference between this and the *Austin* case is that in this no basket was used to hold the many small packages shipped at one and the same time to the same person. In my opinion, such fact is not sufficient to take the case out of reach of the reasoning stated by me for concurring in the decree in the Austin case. For the reasons given for my concurrence in that case, I concur in the judgment rendered in this."

The four other members adhered to the opinion expressed in the Austin case, and held that the right to sell each package of cigarettes as original package existed even though the effect should be to render the police power impotent, which, we with great deference submit, is the correct doctrine, so far as Poinsetta is concered.

We submit that where, without fraud, as here, an original bottle is brought into the State containing Poinsetta, and where the only value of that bottle when so brought consists in the right of the importer to dispose of its contents, the right to do so exists. This Court has permitted the removal of outside covering fixed about packages to prevent breakage and to facilitate shipment, and decided, that the removal thereof does not destroy the character of the original package, nor permit the State to prohibit the sale. There was no desire of any party to sell the containing box. There was no object in bringing that into the State, and it but contained the bottles so that they might not be broken in transportation. They were

loosely placed in the box with their necks inserted in the small hole, as is usual and customary, and the right to bring them in the State in this condition would be worthless, if when so brought, the State could prohibit the sale, not only of said bottles, but also of the entire package.

There is no difference between a sale in bulk and a sale by retail, but the power of sale in the one case is as destructive of the police power as the sale in the other and no more could the State prohibit the sale of a bottle of Poinsetta than it could prohibit the sale of a package of oleomargarine. The placing of oleomargarine in ten pound cans was not done in any greater good faith than the placing of Poinsetta in a bottle. Each was the usual and customary way of doing business, and the custom of so moving commodities is protected by this Court.

In *Wilkerson v. Rahrer*, 140 U. S. 547, 35 L. ed. 572, one of the shipments was thus described:

" 'That the petitioner, Charles A. Rahrer, on the 9th day of August, 1890, offered for sale and sold one pint of whiskey, which was a portion of the liquor shipped by Maynard, Hopkins & Co., as above stated; that said pint of whiskey was sold in the same condition in which it was shipped from the State of Missouri and received in the State of Kansas; that it was separate and distinct from every other package of liquor so shipped, and was sold in the same package in which it was received, being securely inclosed in a wooden box of sufficient size to hold said pint of whiskey."

Throughout the opinion this was treated as an interstate shipment entitled to the protection of the Constitution and only in virtue of the Wilson Bill was it held that Kansas had the right to deal with the situation. At page 577, the Court says:

"In the case at bar, petitioner was arrested by the state authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the state. The Act of Congress had gone into effect on the 8th

of August 1890, providing that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the state; and the law of Kansas forbade the sale. Petitioner was thereby prevented from claiming the right to proceed in defiance of the laws of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors, whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the State Constitution, and the terms of the law (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. We do not mean that the intention is to be imputed of violating any constitutional rule, but that the State law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause.

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed property to fall at once upon arrival within the local jurisdiction.

"It appears from the agreed statement of facts that this liquor arrived in Kansas prior to the passage of the Act of Congress, but no question is presented here as to the right of the importer in reference to the withdrawal of the property from the State, nor can we perceive that the congressional enactment is given a retrospective operation by holding it applicable to a transaction of sale occurring after it took effect. This is not a case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress,

but a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act, in terms, removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property. "Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach."

And the pint of whisky was treated as an original package. See also *Express Company v. Kentucky*, 206 U. S. 129.

In *Brennan v. Titusville*, 153 U. S. 289, 35 L. ed. 721, it was said:

"It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two states. It is as much a burden on commerce to tax for the privilege of selling to a minister as it is to that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but the regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to-wit, pictures and picture frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual

drunkards, or persons under any other affliction or disability. There is no discrimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling-house for the purpose of making a sale. We do not mean to say that none of these matters to which we have referred are within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and the sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented."

We have not brought into requisition any new, untried methods of moving Poinsetta, nor has it been brought into requisition about the time a law was passed prohibiting a sale, nor was it brought into being for the purpose of perpetrating a fraud upon the act. All similar preparations such as soda pop, ginger ale, and coca cola, are moved in this identical way and the right to sell necessarily implies the right to sell upon the most advantageous terms. The right to determine whether the sale be in bulk or not, whether for cash or credit, rests with the importer of the original package, and any state legislation which invades these rights is necessarily void.

As above stated it is not requisite that we should be guaranteed the right to sell each individual bottle as an original package, because the statute prohibits the sale of the entire case of bottles in exactly the same manner as that section which was declared un-

constitutional in the *Leisy* case, *supra*. And when a statute prohibits not only what it lawfully may, but what it constitutionally cannot, and such statute, as is here the case, is so drawn as that no severance is possible, then the entire statute must be declared void because of a want of power in the legislature.

The right to sell is the important thing. That right cannot be denied, and as heretofore stated it is immaterial whether this Court determines that an original package consists of a single bottle or a dozen bottles in a case. The act is equally void because the sale of all is prohibited. The right to sell in the original package exists by virtue of the Constitution. That right has not been respected but is attempted to be taken away.

Furthermore there is no distinction made with reference to the prohibition of the sale between the sale of one hundred barrels or of one bottle; between the sale to be employed as a beverage or to be used as a medicine, but we have an act which prohibits, irrespective of conditions, the sale in the most general terms of any original package.

The right to sell such original package is an integral portion of the right to import said package and wholly beyond the State's police power to absolutely prohibit.

In *Schollenberger v. Pennsylvania*, 171 U. S., 1, 43 L. Ed., 49, two most important principles are settled:

1st. "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In *Minnesota v. Barber*, 136 U. S., 313 (34, 455, 3 Inters. Com. Rep., 185), it was held that an

inspection law relating to an article of food was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer v. Rebman*, 138 U. S., 78 (34, 862, 3 Inters. Com. Rep., 485), and in *Scott v. Donald*, 165 U. S., 58, 97 (41: 632, 644).

"Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Pierce v. New Hampshire*, 46 U. S., 5 How., 504 (12: 256), involving the importation of intoxicating liquors. But in *Leisy v. Hardin*, 135 U. S., 100 (34: 127, 3 Inters. Com. Rep., 36), the New Hampshire case was overruled, and it was stated by the present Chief Justice, in speaking of the court, that 'whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be

exercised by the people of the United States, represented in Congress, and its permission by the latter was considered essential to that more perfect union which the Constitution was adopted to create." (Page 53.)

2nd. Page 58: "The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the state to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The act of the legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another state and its sale in the original package, as described in the special verdict, is invalid."

In *Rhodes v. Iowa*, 170 U. S., 411, 42 L. Ed., 1088, a statute was held violative to the Constitution and not warranted by the Wilson Bill where it attempted to prohibit the shipment of liquor over a state line and to make the police power attach upon the shipment crossing the line. The holding is thus summarized in the syllabus:

"1. The Act of Congress of August 8, 1890, that intoxicating liquors transported into a state shall upon arrival therein be subject to the police laws of the state, does not cause them to be subject to such state laws upon their arrival at the state line in the course of interstate transportation, but only

after their coming into the state and the consummation of their shipment.

"2. Moving intoxicating liquors from the station platform to the freight warehouse of a railroad depot, on their arrival at their destination in Iowa, is a part of the interstate commerce transportation, when they were shipped from another state, and is not a violation of the Iowa statute making the transportation of such liquors from one place to another an offense.

"3. Such statute of Iowa cannot be held to apply to intoxicating liquors while in transit from their point of shipment, Dallas, Illinois, to their delivery to the consignee at the point in Iowa, to which they were consigned."

See, also, especially *Vance v. Vandercook Co.*, 170 U. S., 441, 42 L. Ed., 1102.

See, also, *Scott v. Donald*, 165 U. S., 95; *Emert v. Missouri*, 156 U. S., 321.

There being a prohibition of the right to sell to the importer of an original package under any and all circumstances, we respectfully submit that the statute is unconstitutional under the commerce clause because there can be no severance of the void from that which may be valid, i. e., regulation of intra-state transactions.

PART II.

A Violation of Fourteenth Amendment.

Persons of full age have the power to make any contract, conduct any business, and in general do what they may see fit without receiving the State's permission and the State is without power to prohibit, except that such act or contract shall injure or have a tendency to injure the public welfare. So long as the acts of the individual do not affect the public, just so long can such acts be done and such contracts be made without the public having the right to complain.

In *Reynolds v. Mitchell*, 1 P. Williams, it was declared:

"Another reason is drawn from *Magna Charta*, which is infringed by these acts of power; that statute says, *nullus liber homo, etc., disseisetur de libero tenemento vel libertatibus, vel liberas consuetidinibus suis, etc.*, and these words have been always taken to extend the freedom of trade."

The limit upon the State's police power is accurately set forth in *Lochner v. N. Y.*, 198 U. S., 56, where it is said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve to morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext, become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

"This is not a question of substituting the judgment of the Court for that of the legislature. If the

act be within the power of the State it is valid, although the judgment of the Court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? And that question must be answered by the Court. x x x

Page 61: "The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute."

In *Harper v. California*, 155 U. S. (1894), 662, it was said:

"The enjoyment upon terms of equality with all others in similar circumstances of pursuing an ordinary calling or trade, is an essential part of liberty as guaranteed by the Fourteenth Amendment. *Powell v. Pennsylvania*, 127 U. S., 678, 684. Among the inalienable rights possessed by American citizens is, as Mr. Justice Field has said, 'the right of men to pursue their happiness, by which is meant the right

to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop facilities so as to give them their highest enjoyment.' "

See, also, *Packing Co. v. Bay*, 200 U. S., 185; *Hopkins v. United States*, 171 U. S., 592; *Hudson Water Co. v. McCarter*, 209 U. S., 355; *Welch v. Swasey*, 215 U. S., 103.

In *ex parte Drexel*, 147 Cal. (1905), 766, it was declared:

"This principle is stated very forcibly in the case of *Mugler v. Kansas*, 123 U. S., 661, (8 Sup. Ct., 297), in the following language, 'The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purports to have been enacted to protect the public health, the public morals, or public safety has no real substantial relation to these objections, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.' "

In *State v. Julow*, 31 S. W., 782, it was declared:

"These terms, 'life,' 'liberty,' and 'property,' are respective terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the rights of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may,—all our liberties, personal, civil, and political, —in short, all that make life worth living; and none of these liberties can any one be deprived of except by due process of law. 2 Story, Const. (5th Ed.), par. 1950. Now, as before stated, each of the rights heretofore mentioned carry with it, as its natural and necessary coincident, all that effectuates and

renders complete the full, unrestrained enjoyment of that right. Take, for instance, that of property. Necessarily blended with that right are those of acquiring property by labor, by contract and also of terminating that contract at pleasure, being liable, however civilly for any unwarranted termination. In the case at bar, as will be remembered, the contract was not made for any definite period. From these premises it follows that 'depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision.' *People v. Otis*, 90 N. Y., 48."

In *Leep v. Railway*, 58 Ark. (1894), 415, it was declared:

"The right to acquire and possess property necessarily includes the right to contract; for it is the principle mode of acquisition, and it is the only way by which a person can rightly acquire property by his own exertion. Of all the 'rights of persons' it is the most essential to human happiness."

Page 421: "When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof."

See, also, *Steel Co. v. State*, 66 N. E. (1903), 1007; *State v. Dalton*, 46 Atl. (1900) 237; *Bank v. Grocery Co.*, 97 Tenn. 603.

Under these decisions the right to carry on any lawful business in any way that one may see fit cannot be absolutely prohibited. We recognize that all businesses, when they effect the public, are subject to regulations but not to prohibition. Poinsetta, and the right to manufacture it in America, were obtained at a large expense. The business is conducted in good faith with a large investment of capital and in such a way that its conduct in all things squares with the rules prescribed by the United States

Government for the conduct of this business and the right to sell Poinsetta, which is bottled in a distinctive way, and is of the character described in the agreement of facts, is such that it cannot be taken away absolutely, that in so far as the prohibition of said statute extends to Poinsetta, which is a non-alcoholic drink, incapable of bringing upon any one who may use it any of the effects of intoxication, it is beyond the State's power.

The agreed statement of facts shows that Poinsetta is nutritious, not harmful but of value.

With these factors necessarily integrated into the equation we submit that it is beyond the power of the State to prohibit absolutely the sale of Poinsetta.

The statute must be apportioned to the rectification of the alleged wrong and the question thereof is a judicial one and when the legislature in attempting to remedy an alleged evil by its enactment, exceeds the bounds and makes a law in excess of that which is reasonably required to correct said evil, said law so in excess, when it deprives a party of property, or liberty, becomes void under the Fourteenth Amendment.

The police power is not an absolute power, nor does it authorize interference with private contract, except in pursuance of the fundamental law that the welfare of the people is the highest law.

In the case at bar, it is not merely essential that the legislature deem the act requisite, but the question is one to be determined by the Courts.

In *Commonwealth v. Fowler*, 33 L. R. A. 840, it was said:

"Everyone has the right to follow an innocent calling without permission from the government. He may do with his own whatever he pleases, so that he injure no one else. We agree with the learned counsel that 'the doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men.' So, then,

without governmental interference or consent, we say the farmer may till his soil, the merchant may buy and sell, and the lawyer and the doctor may practice their professions, and the druggist and pharmacist compound their medicines. And if, by reason of shysters and quacks, an injured people demand protection, or if, because ill-behaved druggists or pretended pharmacists debauch the public morals by dealing out intoxicating liquors and nostrums as beverages, yet the pursuit of these callings cannot be prohibited. The innocent and honest druggist cannot be restrained of his liberty by reason of the dishonest practices of others. His pursuit, being in itself harmless, and capable of being conducted without harm to the public, cannot be prohibited, and this is true of every legitimate act going to make up and constitute his trade or profession. It is as true of his right to fill a prescription for whiskey as a medicine as it is of his right to fill one calling for calomel. As said by this Court in *Sarrls v. Commonwealth*, 83 Ky. 332, 'The power of the legislature to prohibit the prescription and sale of liquor to be used as a medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale and use for religious services.' "

In *Dobbins v. Los Angeles*, 195 U. S. 224, it was said:

"To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of the protection of public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is the proper exercise of its police powers is not final or conclusive, *but is subject to the supervision of the courts.*"

And again the Court, in the same case, quotes with approval from 143 California, 368, where it is said:

"But running current with this principle, and to be read with it, is one of equal importance, namely, that when the public power is exercised to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business or vocation which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the authority of the Courts to declare such regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes upon rights guaranteed by the Constitution."

Under these decisions, the question is whether, where a drink like Poinsetta is non-alcoholic, where it can be drunk to any extent without intoxication, where it is valuable and nutritious, the state can forbid its sale; we affirm, under the decisions of this Court, that such cannot be done.

Poinsetta is manufactured in good faith and its characteristics are wholly distinctive and it can in no way be used as a subterfuge whereunder and whereby the laws of the State may be evaded. It is not competent for the legislature to destroy the good in order to prevent the evil. Where a drink is valuable, nutritious, the mere fact that other drinks may be used as a fraud and detrimental to the people does not justify an absolute prohibition of all. See *Hannibal, etc., v. Husen*, 95 U. S. 465, and where a statute of Missouri prohibiting the importation of Mexican cattle was held unconstitutional. The Act was passed in order to prevent the introduction into Missouri of diseased cattle, clearly within the police power, but the right so to legislate did not embrace the right to prohibit the introduction of all cattle because some so imported might be diseased.

The Supreme Court of Mississippi in declaring that the statute could be justified in order to prevent an evasion of the prohibition laws was applying exactly the same line of reasoning as was condemned in those cases by this Court, and especially is it not competent for the State to prohibit the sale of an article like Poinsetta, which has conformed to all of the national requirements and which can be moved in interstate commerce, where that article is nutritious and not destructive in any way of the health of the people.

Such, we submit, has not ever been established in this Court, and we commend to the Court for its reasoning the opinion in the Supreme Court of Alabama, in *Elder v. State*, by Anderson, J., 50 Southern, page 373, which on rehearing became the opinion of the Court.

Reliance is placed by the Supreme Court of Mississippi upon three cases to support the doctrine that the Legislative power extends to the prohibition of a sale of Poinsetta, stating that though the sale of Poinsetta is innocent in itself, yet as other beverages, under other circumstances may be used as a cover, under which to evade the prohibition laws, that, therefore, the legislature had authority to extend this statute to a drink that is healthful and nutritious, which is not in any way intoxicating, and which contains neither alcohol nor saccharine matter.

We direct attention particularly to the fact that the formula was obtained in Germany and the right to prepare it sold for the United States, but that the entire process, so far as disclosed by the record, appears under the agreed statement of facts to which the Attorney General of the State of Mississippi was a party, as follows:

"In the manufacture (of Poinsetta) the cereals employed are not treated the same way as are those used in the preparation of any malt beverage containing alcohol and which is in any way intoxicating, but under said formula the treatment of said grain is that in extracting the valuable food properties

therefrom and in combining them with said water that said grain is not either so fermented or steeped in water or other solvent as to produce saccharine matter or alcohol, and that said beverage when so prepared containing said solids derived from said grain contains none of the properties of any alcoholic drink, nor of any malt drink that will intoxicate, but while technically speaking the primary process employed in the production of Poinsetta may have some few elements in common with those employed in preparing grain in the first stages for malting porter, ale, or beer, still the process thereafter used in the preparation of Poinsetta are so radically and vitally different that they do not bring into said beverage either saccharine matter or alcohol, but are effectual in integrating into said beverage to a large per cent the food values contained in unfermented grain."

Poinsetta is guaranteed under the pure food laws and its taste is distinctive and different from any intoxicating malt liquor or other liquor. Its appearance is such that it would not probably be mistaken for any intoxicating liquor. It has a distinctive odor, dissimilar from that of any intoxicating drink, and more important still, as expressly agreed, and to this agreement the Attorney General of the State of Mississippi was a party, "cannot be employed as a subterfuge for the sale of beer because it is bottled in a distinctive way and its name blown in each bottle which contains the beverage."

These facts must form the basis of the opinion to be rendered by this Court, and we respectfully submit that the Supreme Court of Mississippi was entirely outside of the record in placing Poinsetta within the category of those drinks that were invented as frauds, disguises, subterfuges, attempted evasions, or beverages easily used as subterfuges and known to be the hand maidens of intoxicating beverages.

On the contrary, it expressly appears by the agreed statement of facts that,

1. As to taste it was distinctive.

2. As to color and appearance it was such as not probably to be mistaken for intoxicating liquors.

3. It had a distinctive odor dissimilar from intoxicating liquor.

4. Could not be employed as subterfuge therefor, as bottled in a distinctive way and each bottle contained the name blown into the glass.

Poinsetta is no subterfuge and the owners of it desire that it be allowed to stand upon its distinctive merits. It is common, every day practice to obtain from grain its properties by soaking the same in water. Soups have in them largely these extracts, as do numerous other harmless and innocent drinks, and we respectfully submit that the State of Mississippi in including Poinsetta in the prohibition laws transgress the constitutional limit.

Reliance is had by the Supreme Court of the State of Mississippi upon the *State v. Fargo Bot. Works*, 124 N. W., 387, but we respectfully submit that said decision in no way militates against the contention here made. There was an indictment as follows:

"On June 30th, 1909, the State's attorney of Gass County filed in the District Court of the Third Judicial District for that county an information against the Fargo Bottling Works Company, the defendant and appellant here, the charging part of which is to the effect that the said defendant's corporation, late of the County of Gass and state aforesaid, did commit the crime of selling intoxicating liquor, committed in the manner following, to-wit: That at said time and place the said defendant was and is a corporation duly organized and existing under and by virtue of the laws of the State of North Dakota; that at said time and place the said defendant did wilfully and unlawfully sell to one Arthur W. Fowler a quart bottle full of a certain beverage, which said beverage was then and there labeled 'Purity malt,' and is commonly called and known throughout the

State of North Dakota as 'malt' and was and is a malt liquor, and that in the manufacture and production of which said beverage no alcohol was or is used as an ingredient, but in which, during such manufacture, the alcohol hereinafter referred to was and is produced by chemical action in the beverage itself, and which said beverage therefore then and there had and retained, by reason of the facts aforesaid, the alcoholic principle as a distinctive force, and was then and there and is sold and used throughout the State of North Dakota as a substitute for beer; that said beverage aforesaid contained one and seventy-five one-hundredths (1.75%) per cent of alcohol by volume, and one and forty one-hundredths (1.40%) per cent of alcohol by weight. This against the peace and dignity of the State of North Dakota, and contrary to the form of the statutes in such cases made and provided.'" x x x

The Court quotes to approve Judge Brewer's opinion in the Kansas Intoxicating Liquor Cases, 25 Kan., 764, not 524 as cited, and the gist of that lamented Justice's opinion is to be found in the quotation at page 391, where it was said:

"As said by Judge Brewer in the Kansas intoxicating liquor cases (25 Kan., 524): 'Alcohol is the intoxicating principle, the basis of all intoxicating drinks. Whatever contains alcohol will, if a sufficient quantity be taken, produce intoxication.' This principle or quality tends always to intoxication in a degree, dependent entirely upon the quantity used; but whether or not intoxication is produced the 'principle' remains the same.

" x x x As held by Judge Brewer in the opinion heretofore referred to, the intoxicating liquor acts were not intended as an 'attack upon bay-rum, camphor, or tincture of lemon. It was intended to strike at such liquors and mixtures only as were in ordinary and known use as intoxicating beverages, or which in the failure to obtain such beverages it could fairly and reasonably be believed would be used as substitutes.' The expression, 'become a

substitute for the ordinary intoxicating drinks' can only refer to such beverages as common experience teaches will be used in place of well-known intoxicating liquors, when by reason of a prohibitory statute or other extraordinary cause they cannot be obtained by the usual means of sale and purchase.

"In our view, therefore, under a true, fair, and reasonable interpretation, that clause of chapter 187, Laws 1909, defining the third class of liquors that are to be deemed intoxicating, is intended to describe a beverage which containing alcohol or other drug having an intoxicating quality in a quantity reasonably appreciable in which it has not by chemical combination with other drugs lost its intoxicating principle, and which liquor according to common experience and observation will be resorted to upon a failure to procure the ordinary intoxicating drinks in the usual way. In such a liquor, alcohol, or other drug of kindred quality preserving its native characteristics must be present, but not necessarily in such quantity as to produce intoxication. Whether it is present in a quantity reasonably recognizable and as a distinctive force is a question of fact to be determined by the ordinary tests among which is the consideration that it 'may be used as a beverage and become a substitute for the ordinary intoxicating drinks.'

"We come finally to a consideration of the point that a law under which penal provisions prohibits the sale of a liquor that is not intoxicating or otherwise harmful or detrimental to life and health is a violation of defendant's constitutional rights of liberty and property, and not a legitimate exercise of the police powers of the state. Section 1 of our Constitution provides that "all men x x x have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness.' Section 13 provides, 'no person shall be x x x deprived of life, liberty or property without due pro-

cess of law.' These guaranties are in substance the same as those contained in the fourteenth amendment to the Constitution of the United States, and are generally regarded by the courts as securing to the individual the right to enjoy upon terms of equality with others in similar circumstances the privilege of pursuing any ordinary calling or trade and of acquiring, holding and selling whatever may be legitimately regarded as property. It is a universally accepted principle, however, that the rights of the individual in these particulars are not absolute and may be modified to a degree more or less considerable by measures providing for the general welfare, the protection of the health of the people, the prevention of crime and fraud, and the preservation of the public peace. The power of the state to enact and enforce measures of this character is generally referred to as its police power; and laws passed by a legislature in furtherance of a legitimate exercise of the police power of the state are valid and enforceable, even though they interfere somewhat with the rights of liberty and property of the individual. All this is conceded by defendant, but he contends, notwithstanding, 'that the beverages referred to in the information are the product of painstaking, scientific research. They are more palatable than tea or coffee and less injurious than either. They have been subjected to repeated analyses by the pure food commissioner of this state and always without criticism.' That a law prohibiting their sale has not 'for its object the prevention of a manifest evil or the preservation of the public health, safety, morals, peace and order, or the general welfare,' and is therefore not a legitimate exercise of the police power of the state, but an unauthorized interference with the liberty and property of a citizen.

"Many of the characteristics claimed by defendant for the liquor in question are not admitted, and this Court cannot take judicial notice of these innocent and harmless qualities. The liquor is admitted to contain alcohol, and in the absence of an

admission on the part of the state that it is not intoxicating, would be presumed to be so. Even though not actually intoxicating in ordinary use, a liquor containing the alcholic principle unneutralized and in full vigor to any degree whatever cannot be said to be less injurious than either tea or coffee. It is a matter of common knowledge that liquor of this description, while not actually intoxicating, may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants that may become seriously detrimental to the general welfare. Further than this, an alcoholic liquor that is used throughout the state as a substitute for the ordinary drinks presents a constant opportunity and temptation to the criminal classes to make it a vehicle of subterfuge, fraud, and a means of evading the penalties of the prohibitory law. Such liquors cannot be regarded as innocent and harmless, and must be put in a different class from the wholesome foods in common use, or *from beverages that do not contain the alcoholic principle.* (Italics ours). 'Alcoholic beverages are under the ban of the law in some form or other in most civilized countries. They are known to be the cause of crime, destitution, and pauperism. Malt liquors used as beverages are known to contain that destructive ingredient."

Furthermore, it was further distinctively held, at page 388:

"A malt liquor retaining the *alcoholic principle as a distinctive force which it is admitted* is 'used throughout the state of North Dakota as a substitute for beer,' cannot be regarded as an innocent, harmless, and healthful beverage. It is a matter of common knowledge that all liquor of this description may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants which may become seriously detrimental to the general welfare. A liquor with these characteristics and used in this manner is a convenient vehicle of subterfuge and fraud and means of evading the penalties of the prohibitory

law. For this reason, a statute prohibiting the sale of such liquor within the state is a legitimate exercise of the police power of the state, and is not repugnant to the provisions of sections 1 and 13 of the State Constitution.

"Defendant having pleaded guilty to an information charging that it sold within the state a liquor labeled 'Purity Malt', and commonly called and known as 'malt,' which is a malt liquor retaining the alcoholic principle as a distinctive force which was and is sold and used throughout the state of North Dakota as a substitute for beer, and that said beverage contained 1.75 per cent of alcohol by volume and 1.40 per cent of alcohol by weight, is guilty of a public offense and liable to an imposition of the penalties provided for violation of the prohibitory law of the state."

So that not only did the Purity Malt contain alcohol, but in that case it was proven that it retained alcoholic principle as a distinctive force and that it was admitted that it was used throughout the state of North Dakota as a substitute for beer, so we respectfully submit that so far as Poinsetta is concerned that Court would have adopted the reasoning of Mr. Justice Brewer in the case of 25 Kan., 764, where he said:

"With these general considerations, we pass to a decision of the particular questions presented. It cannot be doubted that section 10 is broad and sweeping enough to bring within the statute every liquid which, by reason of the presence of alcohol, will produce intoxication and this irrespective of the amount of alcohol contained, or the presence of other ingredients of such a character as to prevent any use of the liquid as a beverage. But such was not the intent of the legislature in the act and such therefore cannot be adjudged to be its true import. And speaking for himself alone, the writer of this opinion does not hesitate to say that such a construction, if imperatively demanded by the language used, would carry the statute beyond the power of the legislature.

"I do not think the legislature can prohibit the sale or use of any article whose sale or use involves no danger to the general public. The habits, the occupation, the food, the drink, the life of the individual, are matters of his own choice and determination, and can be abridged or changed by the majority speaking through the legislature only when the public safety, the public health, or the public protection requires it. I do not think the legislature has the power to prohibit the raising or sale of corn, though out of it whisky may be obtained. No more do I believe that the legislature has the power to prohibit the sale of cologne, though alcohol be in it. The constitutional guaranty of 'life, liberty and the pursuit of happiness,' is not limited by the temporary caprice of a present majority, and can be limited only by the absolute necessities of the public.

"But the legislature never intended such a sweeping prohibition. The use of intoxicating liquors as a beverage was the evil and the statute must be read in the light thereof. It intended to put a stop to such use, and limit the use to the necessities of medicine. Now the cases before us group themselves into three classes; and the same division is far reaching and of general application. The first embraces what are generally and popularly known as intoxicating liquors, unmixed with any other substances. Thus in one case the sale of brandy is charged. The second includes articles equally well known, standard articles, and which, while containing alcohol, are never classed as intoxicating beverages. Their uses are culinary, medical, or for the toilet. They are named in the United States dispensatory and other similar standard authorities; the formula for their preparation are there given; their uses and character are as well recognized and known by their names as those of a horse, a spade or an arithmetic. The possibility of a different and occasional use does not change their recognized and established character. A particular spade may be fixed up for a parlor ornament, but the spade does not belong there. So,

essence of lemon may contain enough alcohol to produce intoxication, more alcohol proportionately than many kinds of wine or beer. It is possible that a man may get drunk upon it, but it is no intoxicating liquor. Bay rum, cologne, paregoric, tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof. The third class embraces compounds, preparations, in which the alcoholic stimulant is present, which are not of the established name and character, which are not found in the United States dispensatory, or other like standard authorities, and which may be purely medicinal in their purpose and effect, or mere substitutes for the usual intoxicating beverages. If not intoxicating liquors they may be 'mixtures thereof' within the scope of the statute. Here belong many of the patent medicines, the bitters, cordials, and tonics of the day. Here also are such compounds as that charged in one of the informations before us, a compound of whisky, tolu and wild cherry.

"Now, in reference to these several classes, we think these rules may be laid down: The first class is within and the second without the statute, and the Court as matter of law may so declare. It is unnecessary, in charging the sale of whisky, or brandy, etc., to allege that it will produce intoxication; nor will it bring the sale of essence of lemon within the statute to allege that such essence will produce intoxication. The courts will take judicial notice of the uses and character of these articles. You need not prove what bread is, or for what purpose it is used. No more need you in respect to whisky or gin on the one hand, or cologne, or bay rum, on the other. They are all articles of established name and character. In reference to the third class the question is one of fact, and must be referred to a jury. If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is

not within the statute. The mere presence of alcohol does not necessarily bring the article within the prohibition. The influence of the alcohol may be counteracted by the other elements, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating liquor remain as a distinctive form in the compound, and such compound, is reasonably liable to be used as an intoxicating beverage, it is within the statute, and this though it contain many other ingredients and ingredients of an independent and beneficial force in counteracting disease or strengthening the system. Intoxicating liquors, or mixtures thereof: this, reasonably construed, means liquors which will intoxicate and which are commonly used as beverages for such purposes, and also any mixtures of such liquors as, retaining their intoxicating qualities, it may fairly be presumed may be used as a beverage and become a substitute for the ordinary intoxicating drinks. Whether any particular compound or preparation of this class is then within or without the statute, is a question of fact, to be established by the testimony and determined by a jury. The courts may not say as a matter of law that the presence of a certain per cent of alcohol brings the compound within the prohibition, or that any particular ingredient does or does not destroy the intoxicating influence of the alcohol, or prevent it from ever becoming an intoxicating beverage. Of course, the larger the per cent of alcohol and the more potent the other ingredients, the more probably does it fall within or without the statute; but in each case the question is one of fact, and to be settled as other questions of fact. (The *State v. Laffer*, 38 Iowa, 426; *Russell v. Sloan*, 33 Vt., 659; *Commonwealth v. Ramsdell*, Sup. Ct. Mass., 23 Albany L. J., p. 414).

"Entertaining these views of the true meaning and construction of this statute, the several cases before us must be disposed of as follows: In 2278, 2279 and 2281, in which cases the defendant was charged with selling bay rum, tincture of gentian,

and essence of lemon, respectively, the judgment of the District Court sustaining the motion to quash the informations will be sustained. In 2280, 2295 and 2296, in which the charge was selling McLean's cordial, a preparation of whisky, tolu and wild cherry and prickly-ash bitters respectively, the ruling quashing the informations will be reversed, and the cases remanded for trial. In 2293 and 2294, in which the defendants were convicted of selling brandy and alcohol, respectively, the judgments will be affirmed."

We respectfully submit that there is no danger that Poinsetta will be used as an equivalent for an intoxicating beverage. It contains none of the properties and its characteristics are such as to clearly bring it within Judge Brewer's opinion, where he declared, 'And speaking for himself alone, the writer of this opinion does not hesitate to say that such a construction, if imperatively demanded by the language used would carry the statute beyond the power of the legislature. I do not think that the legislature can prohibit the sale or use of any articles whose sale or use involves no danger to the general public."

Under the agreed statement of facts, we submit, Poinsetta falls within this category.

Reliance is next placed upon *Pennell v. State*, 141 Wis., 37. There the liquor attempted to be prohibited contained 1.44 per cent alcohol by weight and 1.84 per cent by volume, and it was a fermented liquor. The opinion states:

"This principle has been applied to liquor laws quite uniformly and with reference to statutes substantially like ours which prohibited the sale, not only of intoxicants, but of those non-intoxicating beverages, the sale of which might easily be made a cover for the sale of intoxicants. (Citing cases.) We are not obliged to go so far in the instant case, because here the beverage sold was not only within the prohibitory terms of the statute, but contained the intoxicating element in considerate proportion.

"We believe that the admission by the defendant that he sold fermented malt liquors containing al-

cohol constituted the admission of an offense under this statute, and consequently that the further proof offered by him and rejected was immaterial," which the Court will see expressly declares that they did not decide the point upon which reliance was placed by the decision of the Supreme Court of Mississippi because it was not essential.

Reliance then is placed upon *Luther v. State*, 83 Neb., 457, where it is said:

"It was shown upon the trial that upon the filing of the complaint before the magistrate, a search warrant was issued and the sheriff in making a search of the premises of plaintiff in error found 'four full barrels and about a half barrel' of the liquor. There was ample proof that the liquor was kept for sale and sold to be drunk as a beverage, and that a considerable quantity of it had been sold and consumed. The liquor was in bottles, each bottle bearing an illuminated label as follows, omitting names and locality of the brewing company: '————Brewing Company's Non Intox. A non-intoxicating malt tonic. Guaranteed to contain less than 2 per cent of alcohol. Brewed and bottled by the ————Brewing Company, ———— Illinois. Western Branch,———— Mo.' The state chemist was called as a witness on the part of the state, and testified that samples of the liquor had been sent to and analyzed by him, and that the liquor was malt liquor; that all liquors that were brewed from malt were necessarily malt liquors; and that the liquor contained in the bottles is classed, 'in the class of beers'; that the quantity of alcohol usually contained in the lager beer of commerce is on average 'around 3 per cent.' There is no controversy as to the possession and sale of the liquors by plaintiff in error, nor that they were sold and to be sold to be drunk as a beverage. The only contentions are as outlined above. There was no effort to contradict the testimony of the state chemist to the effect that the liquor was a malt liquor, that it contained the percentage of alcohol named, and that it is classed as and 'among the class of beers.'

Page 461: "However, there is another feature of this case upon which all agree, and this is, whether correctly or incorrectly, the District Court did submit the question of the intoxicating quality of the liquor to the jury, and that by their verdict the jury answered the question. The averments of the information are that, at the time and place named in the several counts, plaintiff in error kept for sale and sold 'certain malt and intoxicating liquor, to-wit, 'malt tonic,' etc. The same language, descriptive of the article sold or kept for sale, is used in each of the five counts in the information. The widest latitude was allowed plaintiff in error in his efforts to prove that the drinks sold and kept for sale were not intoxicating. A number of witnesses who had partaken of the beverage were called and testified to the fact of drinking the same, and that no intoxicating effect was felt by them, and that the drink was not intoxicating. One witness who was called by the state testified that he drank of the liquor, and that it had the same effect as beer, but in less degree. The state chemist testified that the intoxicating ingredient was alcohol, and the effect depended upon the individual drinking the liquor, and the lower grade or per cent of alcohol would produce intoxication in a person who was not accustomed to drinking, while a higher grade would be necessary to intoxicate the individual who was in the habit of drinking the stronger liquors.

"The Court instructed the jury that the material allegations which the state must prove were that the plaintiff in error kept or sold liquor 'as charged in the information'; that in order to convict it was necessary that the proof show that the plaintiff in error had the liquor 'described in the information' and sold the same. It is not deemed necessary to further refer to the instructions. It is sufficient to say that the instructions, while not as explicit as they might have been, had any upon that point been necessary, yet, when taken in connection with the evidence, were sufficient to submit the question of the intox-

icating properties of the liquor to the jury. We are of the opinion, however, that the question was improperly submitted, and that no evidence should have been received upon that subject. The error however, having been by the procurement of plaintiff in error, and in no sense to his prejudice, he cannot complain."

It will thus be seen that the first case cited is, we submit, directly in our favor. The other two cases do not decide this question, because in each of them, the liquor to be prohibited contained alcohol as an active principle, but even with that being true there were dissents in both cases.

We submit to this Court that Poinsetta, when it is not harmful, but is nutritious, when it contains no alcoholic principles whatever, but does contain a distinctive taste, presenting an appearance, which would not probably be mistaken for intoxicating liquor, possessing an odor dissimilar from intoxicating liquor and so bottled as not to be capable of being used as a subterfuge, clearly falls within the police power of the State; when it can be drunk without any harmful effects and when it is innocent in itself.

Plaintiff in error having made a large investment in this property, appeals to this Court to be protected in its rights, and respectfully submits that the Supreme Court of the State of Mississippi in enforcing said statute transgressed the fundamental constitutional prohibitions and that said judgment should be reversed, the statute declared void so far as it embraces Poinsetta, and the cause remanded for further proceedings not inconsistent herewith.

Respectfully submitted,

MARCELLUS GREEN,
G. W. GREEN,
MARCEFLLUS GREEN, Jr.

Office Supreme Court, U. S.
FILED.
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CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 464

PURITY EXTRACT & TONIC COMPANY,
Plaintiff in Error,

v.

C. C. LYNCH, Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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In the Supreme Court of the United States

OCTOBER TERM, 1912.

No. 464

PURITY EXTRACT & TONIC COMPANY,
Plaintiff in Error,

v.

C. C. LYNCH, Defendant in Error.

Reply Brief for Plaintiff in Error.

POINTS AND AUTHORITIES.

I.

Chapter 113, Laws of Mississippi, 1908, p. 116, section 1, as interpreted by the Supreme Court of the State of Mississippi, in so far as it regulates the movement of interstate commerce, violates the Federal Constitution. *Louisville & Nashville Railroad Company v. Cook Brewing Company*, 223 U. S. 81.

II.

Cases alleged to be *contra* distinguished.

ARGUMENT.

Point I.

Said Chapter 113, Section 1, as interpreted by the Supreme Court of Mississippi, in so far as it regulates the movement of Poinsetta in interstate commerce, violates the Federal Constitution.

Opposite counsel, brief page 28, admit Poinsetta to be an article of commerce. Since our original brief was written, the case of *Louisville & Nashville Railroad Company v. Cook Brewing Company*, 223 U. S. 81, has been decided to which we make special reference as substantiating our position under Point I of original brief, and as being conclusive.

Point II.

CASES DISTINGUISHED.

Counsel cite *Pernell v. The State*, 123 N. W. 115; *State v. Fargo Bottling Works*, 124 N. W. 387; and *Luther v. State*, 83 Neb. 457, all of which have been noted at length in our original brief.

It is conceded that the Supreme Court of Mississippi holds Poinsetta to be a malt liquor, within the terms, section 1, chapter 113, Laws 1908, but such decision cannot in any way authorize the legislature to interfere with interstate commerce therein, unless this Court shall hold that Poinsetta is a fermented, distilled or other intoxicating liquor or liquid; and unless this Court shall further hold that Poinsetta, under the agreed statement of facts, is such a liquor as falls within the police power to prohibit absolutely its sale. Poinsetta is not intoxicating and under the agreed facts, it cannot be so treated.

Learned counsel who file briefs in this Court are the former Assistant Attorney General, who appeared for the State in the State Supreme Court, and the Ex-Chief Justice of Mississippi, who delivered the opinion.

The case made by the record has been misconceived by the Supreme Court of Mississippi, in its opinion, in this: that the opinion treats Poinsetta as a subterfuge or fraud on the Act, when the agreed state of facts contains no suggestion supporting this declaration.

Turning to the authorities relied upon by opposite counsel, *Reyfelt v. State*, 73 Miss., 415, does not touch the constitutional points raised, and merely held:

> "The legislature believing in chemistry, and that the process of fermentation of the juice of the grape will produce alcohol, has seen fit to prohibit the sale of such product, and, regardless of the opinion of the witnesses that this prohibited article would not intoxicate, the sale was unlawful, for the legislature prohibited such sales because it thought alcoholic wines would, in some instances, intoxicate."

Edwards v. City of Gulfport, 49 So., 620, held that a conviction was warranted where the liquor sold was shown to be "both alcoholic and a malt liquor." This decision does not consider any constitutional proposition.

Marks v. State, 48 So. (Ala.) 864, reaches a diametrically opposite conclusion as to the meaning of the Alabama prohibition statute from that arrived at in this case, by the Supreme Court of Mississippi. In Alabama Poinsetta would not fall within the prohibition law, especially not since the decision of *Elder v. The State*, 50 So. 370.

State v. O'Connell, 58 Atl. 79 (mis-cited as 50 Atl.) is not in point because there the evidence showed that the liquor was brewed from malt and contained two and thirty-six one-hundredths (2.36%) per cent of alcohol, and the question which is made the basis of the decision of the Elder case, *supra*, and under which we rely under the Fourteenth Amendment, could not in any way have been brought in question, and the question here under the commerce clause could not have arisen.

Gilbert v. Kaufman, 67 N. E. 1062, held that the business of selling malt liquors containing less than two (2%) per cent of alcohol was taxable.

Lemly v. State, 28 L. R. A. 645, held that a sale of alcohol was not within the Mississippi statute.

Netso v. The State, 1 L. R. A. 825, does not touch the constitutional questions but it favors plaintiff in error upon the proposition that the Wilson Bill does not authorize the prohibition of the sale of Poinsetta in original packages. There the Court said, quoting from Mr. Bishop:

> "Yet, on this issue there are facts so familiarly known and certain and so completely a part of the language itself, that the Court will take judicial cognizance of them; hence, they need not be proved to the jury. For example, it is judicially known that lager beer is a malt liquor, but probably not that 'pop' is; and whiskey is judicially known to be intoxicating, but malt liquors are not so known."

held that a statute prohibiting the sale of intoxicating liquors in less quantities than one quart, even for medicinal purposes, without a physician's prescription, was not an unconstitutional restraint upon a lawful business, but was the valid exercise of the police power, and it did not touch either question here presented.

Lawrence v. Monroe, 10 L. R. A. (Kan.) 520, involved neither of the questions here. The statute there constituted but a regulation of the sale of cider,— not an absolute prohibition,— and, so far as we have been able to ascertain, the decision by Mr. Justice Brewer, in 25 Kan. 764, still continues to be the law there.

State v. Frederickson, 6 L. R. A. (N. S.) 186, has nothing, we submit, in common with the questions here.

State v. O'Connell, supra, 58 Atl. 59, states roughly what is alleged to be the police power.

The State cannot bring an article within its police power by a simple declaration that such article is what it is not, and thereby acquire the same jurisdiction over it as it has with reference to intoxicating liquors.

Legislative declaration, contrary to the fact, that a beverage is intoxicating cannot take it out of the operation of the Wilson Bill. If so, the fiat of the legislature can repeal the Act of Congress. The Wilson Bill means precisely what it says,—that so far as "fermented, distilled or other intoxicating liquors" are concerned, the State can, under the circumstances mentioned, regulate, to the extent permitted, but that no State, in order to regulate an article like Poinsetta, can first declare that to be intoxicating which is not intoxicating, and thus, by statutory declaration, make it to occupy a classification which its chemical constituents will not justify in order to bring it within the legislative power to regulate the sale. Just as

cating liquor and then attempt the prohibition here sought.

The case of *Feibelman v. State*, 30 Sou. 384, falls squarely within the distinction drawn in the Elder case, *supra*, which distinction is directly applicable to the case at bar.

Counsel's citation from *Black on Intoxicating Liquors*, is, we submit, unfortunate. That author thus squarely states our contention, page 54-55:

"*Section* 43. *Power to Define Intoxicating Liquors.*

"In Rhode Island the courts have sustained the constitutionality of a statute restraining the sale of intoxicating liquors and defining the term to include ale, wine, rum, etc., or any liquors containing more than 2% by weight, of alcohol. It has occasionally been argued that the legislature has no power to declare that to be intoxicating which is not so; that the use of any beverage which is not capable of producing intoxication can have no possible influence upon the public health, safety, or morals; and that, therefore, if the legislature should attempt to include any such innocent article in its prohibition, the statute would be, to that extent, invalid. It is probable that the courts would accede to this reasoning in a very strong case,—a case where there could be no possible doubt as to the innocent nature of the liquor in question. But they are disposed to leave very much to the legislative judgment and discretion, and act with caution in taking judicial notice of the properties of such articles. And, therefore, such a case is not very likely to arise in practice."

U. S. v. Cohn, 52 S. W. 38, does not apply because that was legislation not by the State but by Congress, and, therefore, no question of the regulation of interstate commerce could arise; nor could the other proposition under the Fourteenth Amendment be brought into consideration because the decoction there sold

was "a weak character of lager beer manufactured from malt containing 2% of alcohol to be used as a beverage."

State v. York, 74 N. H. 125 is not applicable. *State v. Frederickson*, cited from 115 Am. St. Rep. 295, is the same case as was referred to on page 10 of counsel's brief, cited from 6 L. R. A. (N. S.) 186; and *State v. Conner* is the same case as is cited under the style of *State v. O'Connell*, 58 Atl. 39 (p. 10), and *State v. O'Connell*, 50 Atl. 59 (p. 8).

U. S. v. Ducourneau, 54 Fed. 138, merely determined:

> "1. Beer is judicially known to be a fermented liquor, chiefly made of malt, and proof of selling beer not shown to be otherwise made, will support an indictment for selling malt liquor."

Walker v. Daily, 101 Ill. App. 575, deals solely with the question of whether or not lemon extract was sold as an intoxicating liquor, in violation of the dram shop act of Illinois, it being conceded that it contained 95% alcohol. This Court adopted the reasoning of Justice Brewer, 25 Kansas, *supra*, and contains nothing to which we take exception.

Holcomb v. People, 49 Ill. App. 73, holds:

> "1. An article generally and properly known and used for culinary purposes, recognized, and a formula prescribed for its preparation as such, in standard dispensaries, prior to the enactment of the dram shop act, and not then known and qualified among liquors used as a beverage, is not to be deemed an intoxicating liquor within the meaning of this enactment, simply because it contains alcohol, and may, or, in fact, does produce intoxication."

Caldwell v. State, 112 Ga. 135 is clearly a misciation. The reported case under this style is to be found in 101 Ga. 557, but it does not reach the points made in the case at bar.

In *Campbell v. Thomasville*, 64 S. E. 821, the Court says:

> "2. Also, at the beginning of the opinion, we may as well introduce to bench and bar this new recruit in the ranks of that army of subjects which are wont to trouble the courts, 'near beer,' and give its name a place in the roll of judicial definitions. 'Near Beer,' is a term now of general currency in this State, and perhaps elsewhere, used to designate any and all of that class of malt liquors which contain so little alcohol that they will not produce intoxication, even though drunk to excess. *It includes all malt liquors which are not within the purview of the general prohibition law.*" (Italics ours.)

We submit this case strongly supports our contention.

But from the agreed state of facts here, it is perfectly manifest that Poinsetta, whatever else it may be, is not "near beer." It lacks the requisite alcoholic element. Furthermore, that same Court, at page 823, said:

> "Its very name, so to speak, is a transcript of its character. A liquor that is 'near beer,' looks like beer, smells like beer, tastes somewhat like beer, capable of cheering, though not inebriating, well deserved the attention of those whose duty it is to protect the health, peace, and good order of the community."

This would, we submit, exclude Poinsetta, which is to be sold upon its merits and not as a subterfuge.

State v. Auditor, 68 Ohio St. 644, demonstrates that there are two classes of malt liquors, *intoxicating* and *non-intoxicating*, and that the generic term includes both, and, hence, the Wilson Bill could not under this decision have embraced a non-intoxicating liquor under the designation of an intoxicating liquor, for while it is true that malt liquors may be both intoxicating and non-intoxicating, it has never been and never can be that an intoxicating liquor can be

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In The Supreme Court of The United States.

OCTOBER TERM, 1912.

PURITY EXTRACT & TONIC COMPANY, Appellant

vs.

C. C. LYNCH, Appellee

In this case the appellee is not represented by counsel, as it is in reality a test case and comes up on an agreed statement of facts. As the law under review is of great importance to the State, we are, at the request of the Governor and through courtesy of counsel for the appellant, filing this brief as friends of the court representing the State of Mississippi.

STATEMENT OF FACTS.

This suit was begun by appellant by declaration in the Circuit Court of Hinds county, Mississippi, for damages for breach of a contract entered into with appellee, by the terms of which appellee had agreed to handle in Mississippi a beverage manufactured by appellant known as Poinsetta. The case was tried on an agreed state of facts, as it involves purely a question of law. There was a judgment for appellee in the Circuit Court and an appeal to the Supreme Court, where the judgment of the lower court was affirmed (56 Sou. 316.), and the case is now in this Court on a writ of error. The facts are in substance, as follows:

"Appellant is a corporation located in the city of Chattanooga, Tennessee, and is engaged in the manufacture and sale of a beverage known as Poinsetta. Sometime in November, 1910, appellant made a contract with Lynch under the terms of which Lynch agreed to buy Poinsetta for a period of five years from January 1, 1911. The contract stipulated that appellant should deliver the beverage to the railroad company at Chattanooga, consigned to Lynch at Jackson, Hinds county, Mississippi. The contract further stipulated that Lynch should only have the right to sell the beverage in the county of Hinds, State of Mississippi, and Lynch contracted to pay for this exclusive privilege the sum of $500. Lynch failed to comply with his part of the contract whereupon appellant instituted this suit. The defense is that the beverage is prohibited by law from being sold in Hinds county, and since the contract is violative of the law, he claims non-liability under same.

"The case is before the court on an agreed state of facts. The agreed facts state that Poinsetta contains no alcohol, preservatives, or saccharine. It is agreed that Poinsetta is sold as a beverage and is composed of 90.45 per cent of pure distilled water, and 9.55 per cent of solids, all of the solids being derived from cereals in an unfermented state, and being wholesome and nutritious. But it also appears that it does contain 5.73 per cent of malt.

"The formula for making the beverage is not given, but it is agreed that in the manufacture of same the cereals used are not treated in the same way as those used in the preparation of any malt beverage containing alcohol which will intoxicate, but the treatment of the grain is by extracting the valuable food properties and combining them with water, so that the grain is not fermented or steeped in such a way as to produce saccharine matter or alcohol; that the beverage contains none of the properties of alcoholic drink or of malt drinks that would intoxicate. The primary process employed in the production of Poinsetta has some of the elements

in common with some of those employed in preparing grain for malting porter, ale, or beer, etc., but the process thereafter used in the preparation of this beverage is radically different from that used to produce ale, beer, etc.; but Poinsetta is made from malt. It is agreed that its taste is distinct and different from any intoxicating malt or other liquor. It is agreed that it has not the appearance or odor of intoxicating liquor, and cannot be employed as a subterfuge."

ARGUMENT.

The statute of Mississippi under review is found in the Laws of 1908, on page 116, being Section 1, of Chapter 115, amending Section 1746 of the Code of 1906, and is as follows:

"If any person shall sell or barter, or give away to induce trade, or keep for sale, or barter, or to be given away to induce trade, any vinous, alcoholic, malt, intoxicating, or spiritous liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication, such person, and all others who may have owned or had any interest at the time in the liquors, bitters or drinks, sold or bartered, or to be given away to induce trade contrary to law, shall, on conviction be fined," etc.

The record shows that Poinsetta, though not intoxicating, and though containing no alcohol, is the product of hops or other cereals producing malt and contains 5:73 per cent of malt out of 9.55 per cent of solid matter, the balance being water. It is admitted also that Poinsetta is sold as a beverage and it is our contention that since it is a beverage containing an appreciable quantity of malt, it is a malt liquor within the meaning of the prohibition statute of Mississippi. The fact that the statute enumerate malt liquor as one of those prohibited, brings Poinsetta within its terms, because Poinsetta is admitted to be malt liquor, and it makes no difference whether it is alcoholic or intoxicating or not. Our Court has so held in a number of cases, and the courts

of other states have so construed the statutes similar to that of Mississippi. Before quoting from any of them, we take the liberty of quoting from the opinion of the Supreme Court of Mississippi, affirming the instant case:

"In the discussion of this case we start out with the admission of counsel that this drink is a beverage containing no alcohol, it is true, but containing 5.73 per cent of malt, and we unhesitating pronounce the beverage a malt liquor. It can be nothing else.

"The legislative acts of 1910, page 116, Sec. 1, prohibit the sale in this State of any vinous, alcoholic, malt, intoxicating or spiritous liquors. The sale of malt liquor is prohibited whether in fact it intoxicates or not. In the cases of Fuller v. City of Jackson, 52 Sou. Rep. 876; Reyfelt v. State, 73 Miss., 415, and Edwards v. City of Gulfport, 49 Sou. Rep. 620, it was held that where the statute prohibited the sale of a certain named class of liquors as intoxicating liquors, such liquors could not be lawfully sold, though in fact they were not intoxicants. Poinsetta may or may not be an intoxicant, but it is a malt liquor and as such is prohibited from being sold in this State. The prohibition laws cannot be made effective unless it excludes all subterfuges.

"It is argued by counsel for appellant that if the legislative act in question is intended to shut off the sale of any beverage containing no alcohol, which is not in itself harmful, then the act is unconstitutional and beyond the police power of the State. In so far as this question is concerned we have settled it in the case of Fuller v. City of Jackson, 52 Sou. Rep., 876. In this connection we can do no better than quote the language of Chief Justice Dowdell in the case of Elder v. State, 50 Sou. Rep. 370:

" 'If it should be conceded that the articles, the sale of which is prohibited by the act, are not in themselves injurious to health or morals, still there can be no doubt, under former decisions of this court, that to prohibit the sale of the articles mentioned is not without legislative competency. To prohibit the sale of malt liquors is undeniably within the police power of the State. The ex-

ercise of this power by the legislature in the prohibition of the sale of malt liquor, is upon the idea of the conservation of public morals. To this end it must logically follow that it is equally within the police power of the State, through its lawmakers, to enact any and all laws in their wisdom necessary to prevent any evasion of the primary purpose. If, in the wisdom of the legislature, in order more thoroughly to prohibit the sale of malt liquor, which is known to be an intoxicant, and to safeguard against evasions of such law, it should be deemed necessary to prohibit the sale of any and all beverages containing as an ingredient "maltose," a known constituent of malt liquor, we are unable to see why such legislation would not reasonably come within the exercise of the State's police power.'

"We are aware of the fact that the language of Chief Justice Dowdell, speaking for the Alabama Court, was afterwards receded from by a majority of the court, but the principle declared by him has been followed by other courts and concurred in by this court in the Fuller case referred to above."

Though a majority of the court afterwards receded from the devision in the Elder case, the principle declared in the first instance has been declared to be the law in Mississippi in several cases, and we submit that these decisions should be permitted to stand.

The legislature is supposed to know the needs of the State. Coming fresh from the people, its members are well acquainted with the many difficulties encountered in enforcing prohibition statutes because of the many substitutes, subterfuges and imitations, harmless in many instances and harmful in many others, which have been put upon the market in an effort to evade the law. It has been found necessary, in order to enforce such statutes, that all such liquors, not only the harmful but the harmless as well, be placed under the ban, and the legislature of Mississippi has enumerated the various kinds of liquors the sale of which is prohibited, naming every conceivable kind; for instance, vinous, alcoholic, malt, intoxicating, spiritous; so that if any liquor falls

within any of these classes it is prohibited; and then for fear something might be concocted which had not been enumerated, the legislature used the broad and sweeping language, "or other drinks which, if drunk to excess, will produce intoxication," but these words were not used to qualify vinous liquors nor alcoholic liquors nor malt liquors, nor spiritous liquors which had already been specifically prohibited.

I quote the following extracts from Pennell vs. State, 113 N. W. 115: "Malting is a process preliminary to fermentation."

"The statute prohibits the sale of malt liquors and that is conclusive."

"In enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves the subject of police regulation, where the inclusion of such acts is necessary in the opinion of the legislature to make effective the police regulation."

"This principle has been applied to liquor laws quite uniformly with reference to statutes which prohibited the sale not only of intoxicants, but of those non-intoxicating beverages the sale of which might easily be made a cover to the sale of intoxicants."

This case is a litigation between two individuals. One had made a contract with the other to sell in Mississippi a malt drink called Poinsetta. The sale of all malt drinks is prohibited in this State by the terms of the statute above quoted, and we feel justified in stating from the record that in reality, this suit is an ingenious effort on the part of both appellant and appellee to experiment with the courts to see if the police power of the State cannot be so limited as to enable a slip-gap to be made in the prohibitory laws, to the end that subterfuges and substitutes may be sold, and thus break down the effectiveness of these wholesome and salutary laws. We apprehend this effort will be fruitless.

When the court has examined this case, it will be seen that it involves but a single question, and that is, whether or not the State of Mississippi exceeded its po-

lice powers when, in enacting the law of 1908, prohibiting the sale of malt liquors, classing them along with intoxicating liquors, whether, in fact, intoxicating or not.

Can it be said that when the wisdom of the legislature suggests that the prohibition laws of the State cannot be made effective without including not only intoxicating drinks but also such non-intoxicating drinks as are made out of a substance from which intoxicants are made and may easily be converted into a subterfuge, that there is no reasonable relation between the statute and the lawful object sought to be accomplished by it?

In various cases cited in this brief, we endeavor to show that the Supreme Court of Mississippi has held many times that since the statute prohibited the sale of malt liquors, such liquors could not be sold, even though they were non-intoxicating. The reason for such holding by the Mississippi court was because it recognized that the legislature must have meant just what it said and used this language advisedly, realizing that they could not otherwise give effect to the prohibitory laws.

The law in Mississippi has been fully considered in the case of Fuller vs. Jackson, 30 L. R. A. (N. S.) p. 1078. The opinion of Chief Justice Mayes (p. 1081) in response to the suggestion of error, is the law of the case.

The Court said, on page 1082: "The sale of these liquors is prohibited without reference to whether in fact they intoxicate, but because it is well known that this class of liquors (vinous, alcoholic, malt or spiritous) are of intoxicating character."

To the same effect, see Reyfelt vs. State, 73 Miss. 415, where it was held that a party was charged with selling a vinous liquor, it was not necessary to show that such liquor was intoxicating.

In the Edwards case, 49 Sou. 620, it was expressly held that if the liquor was shown to be malt, it was unnecessary to prove its intoxicating properties.

In the Marks case (Ala.) 48 So. 864, the Court said: "When a prohibition statute names, designates or enumerates the kinds, classes or species of beverages against

which its provision was directed, then there is no room for further inquiry into the scope of such statute. * * * We cannot concur in the contention that the class, 'which, if drunk to excess, will produce intoxication,' qualifies and relates to each of the liquors or beverages which precede it—that is, to alcoholic, spiritous, vinous or malt drinks."

To the same effect see United States v. Cohn, 52 S. W., 38. See especially the concurring opinion of Mr. Justice Thomas.

In the case of **Reyfelt vs. State, 73 Miss., 415,** the Court held that under an indictment charging the sale of vinous or alcoholic liquors, the sale of home-made wine from the juice of grapes or blackberries, even though not intoxicating, was a violation of the statute, and refused to submit the question of the intoxicating properties of this liquor to the jury. Wine is known to be a vinous liquor and is therefore prohibited.

Poinsetta is a malt liquor and is therefore prohibited, regardless of intoxicating properties.

"If the liquor sold was a malt liquor, it is not necessary for a jury to determine whether it was or was not intoxicating in fact."

State vs. O'Connell, 50 Atlantic, 59.

Guilbert vs. Kaufman, 67 N. E., 1062.

A discussion of the subject of what is, or is not, intoxicating liquor under the several statutes is to be found in the notes to the case of **Lemly vs. State, 20 L. R. A. (O. S.) 645.**

In the case of **Netso vs. State, 1 L. R. A., 825,** the Supreme Court of Florida held, in order to sustain a conviction for violating the law prohibiting the sale of malt liquor, it must be shown that the liquor sold was "malt."

In **Syllabus 2,** it is said: "And courts will take judicial notice that lager beer, ale, porter and any other liquors made of malt is a malt liquor."

It was held by the Supreme Court of Kentucky, in the case of Commonwealth vs. Fowler, 33 L. R. A. (O. S.) page 839, that the legislature had the right even to

go so far as to prohibit the sale of intoxicating liquor by a druggist for medicinal purposes and that such a law was not unconstitutional as being in restraint of a lawful business, but was a valid exercise of police power. See also foot notes to this case.

In the case of State vs. Fargo Bottling Works, 26 L. R. A. (N. S.) 872, in that part of the opinion on page 881, the Court said: "It is contended by the defendant that notwithstanding the beverages referred to in the information are the products of painstaking, scientific research, they are more palatable than tea or coffee and less injurious than either; they have been subject to repeated analyses by the Pure Food Commissioner of the State and always without criticism. That a law prohibiting their sale has not for its object the prevention of a manifest evil, or the preservation of the public health, safety, morals, peace and order, or the general welfare, and is therefore not a legitimate exercise of the police power of the State."

In response to this contention, the Court held, that: "It is a matter of common knowledge that liquor of this description while not actually intoxicating, may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants that may become seriously detrimental to the general welfare. * * * The State, in the exercise of its police powers, has an undoubted right to take into consideration not only the effect of the article sold upon the life and health of the individual, but also the effect that it may be used readily and conveniently as a cover to violations of the law."

Numerous citations are referred to, among others:

Luther vs. State, 20 L. R. A. (N. S.) 1146.

Lawrence v. Monroe, 10 L. R. A., 520.

The Court will note that in the Fargo Bottling Works case, it was admitted that "purity malt" contained a small quantity of alcohol, though not enough to intoxicate, but we do not think it makes any special difference, for the reason that Poinsetta is admitted to be a malt beverage, and malt beverages are prohibited by our statute and the prohibition of such a beverage is

without doubt a legitimate exercise of the police powers of the State.

In the case of Luther vs. State, 20 L. R. A. (N. S.) p. 1146, it was held that the statute applied to all malt liquors to be used as a beverage, whether intoxicating or not. The statute of Nebraska is similar to that of Mississippi. The Court said, on page 1150, in response to the contention of the plaintiff in error, that it was the purpose of the statute to prevent only the sale of malt liquors where the quantity of alcohol contained in them was sufficient to produce intoxication: I cannot read the statute in that light. As well might we apply the adjective (intoxicating) to the words "spiritous," or "vinous." It is my opinion that the legislature realized and appreciated the fact that malt, spiritous and vinous liquors are equally largely used as a beverage and are alike injurious to the consumer, if not by producing immediate intoxication when taken in small quantities, by producing the same effect when more is taken and at the same time creating an abnormal appetite which leads to dissipation and inebriety. At any rate, the law prohibits the sale of malt liquors and we must obey its plain mandate."

The Court there held that there was a direct prohibition against the sale of either malt, spiritous or vinous liquors in specific term by name.

The case of State vs. Fredrickson, 6 L. R. A. (N. S.) 186, controls the case at bar. The statute of Maine prohibited the sale of intoxicating liquors and among others enumerated as intoxicating was cider, without regard to whether it is fermented or intoxicating in fact. The Court held that the sale of cider was unlawful under that statute and that the statute was constitutional. The Court in that case said:

"In determining whether or not a liquor is to be regarded as intoxicating under this enumeration, it is entirely immaterial whether it is intoxicating in fact."

The Court cites a large number of cases to which we invite attention:

State vs. O'Connell (Me) 58 Atlantic, 59, where the

Court said:. "While the legislature cannot make that intoxicating which is in fact not intoxicating, it may declare all malt liquors to be intoxicating within the meaning of the statute prohibiting the sale of intoxicating liquors."

In the Fredrickson case, the constitutionality of the act was assailed and we invite the Court to a reading of the latter part of the opinion and the authorities there cited.

In Feibelman vs. State (Ala.), 30 Sou. 384, the Court said: "But if the prohibition should in terms go only to the sale of intoxicating malt liquors, there would be left open such opportunities for evasions of the law and there would arise such difficulties of proof as that the law could not be effectively executed; and the lawmakers having the undoubted power to prohibit and prevent, and to enact to that end a law which can be executed so as to secure it, and finding that this cannot be accomplished without extending the prohibition to all malt liquors, whether intoxicating or not, such extension, necessary to prevent the sale of intoxicants, is as essentially the proper exercise of the police power as the inhibition with reference to intoxicants."

See also, Black on Intoxicating Liquors, Sec. 43, in re Spickler, 43 Fed., 653.

In the case of U. S. vs. Cohn, a case from the Indian Territory, reported in 52 S. W., page 38, the Court used this language:

"If it were intended that only such of these (liquors) as could be shown to be intoxicating should be included, why name them at all? Why not say that all intoxicating liquors and drinks should be prohibited?"

See also State vs. York, 74 New Hamp. 125, 65 Atlantic, 685.

State vs. Fredrickson, 115 Am. St. Rep. 295.

State vs. Conner, 99 Me. 61.

In the Fredrickson case, the beverage sold was cider, which was unfermented and not intoxicating and yet the court held that it fell within the scope of the forbidden class. See Syl. in that case.

Much has been said about the right of a court to interfere with the legitimate trade, and the fear is expressed that the legislatures might attempt to interfere with the sale by druggists of medicines containing alcohol. Such fears, of course, are ungrounded. The statutes of Mississippi, and presumably the statutes of all other States make special exception in favor of alcohol sold for medicinal purposes. Medicines, toilet articles and flavoring extracts are rarely ever sold for the purpose of evading the prohibition laws. If a patent medicine, composed largely of alcohol, is sold as a beverage, or as a substitute for liquor, then the prohibition statute might interfere with such business, and ought to do so. Of course it could not interfere with the legitimate business of the druggist, carried on in good faith. Poinsetta is admittedly sold and consumed as a beverage to satisfy the thirst. Suppose it is a healthful drink? Some say beer is very wholesome, and whiskey is known to be prescribed by physicians in many instances and is really indispensable in the practice of medicine; but the same law which would prevent a druggist from dishing out whiskey as a beverage, will prevent him from selling wine, beer or any vinous or malt drink, whether intoxicating or not. Poinsetta falls in the latter case; it is a non-intoxicating, malt beverage. A malt liquor is defined as being a beverage prepared by infusion of malt. **U. S. vs. Ducourneau, 54 Fed. 138.**

But it is argued that Poinsetta cannot be used as a subterfuge for beer because it is distinctive in taste, color and odor and has the name blown in the bottle. Although it may not be used as a subterfuge, yet it may be used as a substitute; being a malt drink it may gratify the craving for malt liquors or it may lead to the creation of a desire for malt liquors.

See also the following authorities:

Walker vs. Dailey, 101, 111, App. 575.
Holcomb vs. State, 49, 111, App. 73.
Caldwell vs. State, 112 Ga. 135.
Campbell vs. Thomasville, 64 S. E. 814.
State vs. Auditor, 68 Ohio St. 635.

Smith vs. State, 49 Sou. 115.

In this last case there is a distinction drawn between vinous and spiritous and malt liquors. Beer is there recognized as a malt liquor and the Court refused to sustain a conviction where the indictment charged the sale of vinous and spiritous liquors. Malt liquors seem to be in a class to themselves and need not necessarily be alcoholic or intoxicating. Our statute prohibits their sale without reference to their intoxicating or alcoholic properties.

Perhaps we have dwelt unusually long upon features of the case where a Federal question is not involved, but we do so because we wish to emphasize the fact that the Supreme Court of Mississippi, in its construction of the prohibition statute under consideration, has not differed from other courts where similar statutes were under review, and that in holding that the statute applied to malt liquors, regardless of intoxicating properties, our court is in line with the best authorities, and for the further reason that in the consideration of the constitutional question, the Court will be called upon to interpret the language of the Wilson Act, and it is our contention that the sole purpose of the enactment of this law by Congress, was to commit to the states absolutely, the regulation of the sale of all beverages condemned by the statutes of the several states, regardless of the intoxicating properties of such beverages. The enforcement of the prohibition law is of greatest importance to the State, and the Court should, if possible, uphold the legislative act and the interpretation placed upon it by the highest court of the State, and should only interfere where it is a flagrant invasion of a private right such as brings it within the clear condemnation of the Constitution of the United States. It is our contention that the states never intended to delegate to the national government the right to interfere with the police powers of the states so long as they were reasonably exercised, and the legislatures of the states are better judges of the necessities which arise demanding such legislation.

CONSTITUTIONALITY.

It is argued by appellants that the State has exceeded its police powers in attempting to prohibit the sale of malt liquors which are non-intoxicating, and that the act violates the Fourteenth Amendment to the Constitution of the United States, since it deprives those who are engaged in this business of their property without due process of law.

Before citing any cases, it may not be amiss to invite your Honors' special attention to the case now on trial, as furnishing proof of how essential it is to the efficiency of the prohibitory laws and the accomplishment of the purpose intended by such laws, that they should be broad enough to include all beverages which might be used as a subterfuge, and that this was the real purpose of the statute. If appellant's contention should prevail in this case, numerous other concoctions would be put upon the market in an effort to evade the plain terms of the statute. The question, therefore, is one of grave importance to the State.

We respectfully invite the Court's attention to the case of **Chicago B. and Q. Railroad vs. McGuire, 219 U. S., 549 (55 L. Ed. 328)**, especially that part of the opinion on page 569 (339) where the Court said, in substance, that in determining whether or not a State had exceeded its police powers it would never overthrow a statute of a State unless the action of the legislature was arbitrary and had no reasonable relation to a purpose which it was competent for the government to effect. The Court further said, that the question of power must not be confused with legislative policy and that the Court would not undertake to determine upon the wisdom, or lack of wisdom, of any particular statute, but if the legislature had confined themselves within such limitations as were necessary to complete the purpose which it had in view, the Supreme Court of the United States would not disturb this law, even though the scope of the act seemed to be broader than was necessary.

On this point we direct the Court's attention to the

following cases, which, to us, seem conclusive when considered with the Mississippi statute under consideration, and the decisions of the Supreme Court of Mississippi construing them, elsewhere referred to in this brief:

Otis vs. Parker, 187 U. S., 606; 47 L. Ed. 323;
Ah Sin vs. Wittman, 198 U. S. 509; 49 L. Ed. 1142.
Lemieux vs. Young, 211 U. S. 489; 53 L. Ed. 295.
Kidd, et al vs. Musselman, 217 U. S. 461; 54 L. Ed. 839.

I call special attention to the case of **Booth vs. Illinois, 184 U. S. 425; 46 L. Ed. 623.** In this case, a statute prohibiting dealing in futures, was held to be in no way violative of the Fourteenth Amendment, because it interfered with business. The purpose of the statute was evidently to prohibit gambling, and yet, legitimate transactions where grain was to be delivered at a future time were prohibited. The opinion of Mr. Justice Harlan would seem to set at rest all doubt as to the right of a State, in the exercise of its police power, to prohibit that which is lawful and perhaps harmless in order to effect its purpose of preventing the pernicious habit of gambling. The learned Justice uses the following language:

"It is however said that the statute of the State as interpreted by its highest court, is not directed against gambling contracts relating to the sale or buying of grain or other commodities, but against mere options to sell or buy at a future time, without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling. The argument, then, is that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty, as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the ten-

dency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of the rights secured by the fundamental law."

The Supreme Court of Mississippi, in the case of **Fuller vs. City, 52 Sou. 877; 30 L. R. A. (N. S.), p. 1078,** used the following language:

"I do not think the constitutionality of a statute of this character can be successfully controverted. The police power of a State is broad enough to prohibit the sale of those things which it considers destructive of the health, the good morals and the peace of its citizens. If the State has this power it is necessarily vested with the authority to make its laws effective, and the subterfuges and disguises resorted to by the ingenious violators of the liquor laws are as well known to the legislator and the judge as to those who violate the law. Knowing the schemes resorted to by those who would destroy the prohibition laws and make them farcical by their failure to give that protection from the evil of intoxicants, which is their design and purpose, the legislature has met all schemes of those who would evade, by prohibiting the sale of such subterfuges. It has prohibited the sale, not only of intoxicants, but of that character of liquors which go hand in hand with intoxicants; that is, have the character of intoxicants, though in truth they do not intoxicate. The police power of the State is not so impotent or restricted as that it cannot combat and repel all evasions. We hear much of the constitutional rights; but no man's rights are infringed upon by this act of the legislature, and the construction

which I gave it and which this Court has given it, unless such person desires to engage in the traffic of intoxicants. Surely the State can say to such person that you cannot profit in the sale of this contraband article of merchandise, no matter how small the quantity sold, or by what name you call it. If this great power of the State could be thus thwarted by those engaged in criminal acts, it would indeed be an impotent thing. In criminal and in civil law, fraud, disguise, and pretense, whatever form it has assumed in an effort to subvert the good faith of the law, has not been subtle enough to evade the legislatures and the courts for long."

There can be no doubt about the constitutionality of prohibition statutes in general; that point has been settled beyond dispute by the courts of the country. It is clear, also, that legislatures have the right, in order to protect the people from evasions of the law, to include in prohibition statutes non-intoxicating beverages, and our own Court is laying down no new principle of law by its announcement, in the Fuller case. See also Feibelman vs. State (Ala.), 30 Sou. 384.

It is folly to say that the appellant has been deprived of any inherent right. He has no right to do that which, in the judgment of the legislature, has been condemned in order to carry out the benign purposes of a prohibition statute. Harmless beverages must be condemned in order to destroy traffic in harmful beverages, and if Poinsetta happens to fall within the condemned class and if, by condemning it, the legislature deprives appellant from making a profit in Mississippi, there will be no greater loss of money or property, or opportunity for profit, than has been the case in many States where expensive plants have been put out of business. Breweries, distilleries, wholesale and retail liquor establishments have all had to go; handsome bars at hotels have been closed. A State is allowed large discretion in the exercise of its police powers, and properly so. It has been found necessary in the enforcement of the law and courts should not interfere with the statutes of a State which is honestly making an effort to

regulate a traffic in articles of commerce which the judgment of the legislature concludes should be stopped. A prohibition statute may destroy property values; this is one of the necessary results of such a statute. In the enforcement of the criminal law, it has been found necessary to make the owner of a building in which liquors are sold amenable to law, though he himself has not been engaged in the traffic in any way. Mr. Cooley says that a statute which can confiscate property rights and destroy business, "must be justifiable upon the suggested reasons of public benefit; but whether satisfactory or not, are reasons that address themselves exclusively to legislative wisdom." Cooley Const. Lim, (7th Ed.), p. 150. See also Black on Intoxicating Liquors, Sec. 34.

The 14th Amendment is a haven of refuge for many who would violate the laws of a State. Merely because Poinsetta is not intoxicating is no reason why its condemnation by the statute prohibiting the sale of a malt beverage should be in violation of the Constitution of the United States. In endeavoring to regulate the liquor traffic, the legislature has been forced to condemn malt beverages, whether intoxicating or not; and if Poinsetta should be permitted to be sold because it is not intoxicating, then the various kinds of near-beer, admittedly products of malt, many of which are non-intoxicating and contain alcohol in a very small degree, perhaps a negligible quantity, would demand entrance into the State. Perhaps this near-beer might not be so easily distinguished from the real article, yet, if counsel's contention is good, it could not be excluded, and the result would be that so many drinks would be sold that the prohibition statutes would be so easily evaded that they would be of no avail.

Mr. Cooley says further (page 849) "These State laws, known as prohibitory liquor laws, the purpose of which is to prevent the manufacture and sale of intoxicating drinks as a beverage, so far as legislation can accomplish the object, cannot be held void as in conflict with the 14th Amendment. See citations to Note 1.

In the case of Lawrence vs. Monroe (Kansas) 10 L.

R. A. 520, an ordinance was upheld by which the city undertook to regulate the sale of non-intoxicating cider. The appellant contended that cider is a harmless and wholesome drink and that any restriction upon its sale is unretsonable and unlawful and in restraint of trade, therefore unconstitutional. The court held that such a regulation violated no private right and was not an improper restraint of trade, but was in the spirit of peace and good order of the community.

In enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves the subject of police regulation, where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective. **Pennell vs. State, 141 Wis. 35.** See also, **Booth vs. Illinois, 184 U. S., 425,** where, in the effort to suppress gambling, contracts for future dealing of grain were prohibited; and **Otis vs. Parker, 187 U. S. 606,** where contracts for stocks to be delivered in the future were prohibited, where the Court said: "If the State thinks an admitted evil cannot be prevented except by prohibiting a calling or transaction, not in itself necessarily objectionable, the courts cannot interfere, unless it is clear, unmistakable infringement of the rights secured by the fundamental law." See cases cited in this opinion.

The well considered case of **State ex rel vs. Aiken,** from the South Carolina Supreme Court, 26 L. R. A., 345, contains an elaborate discussion of the whole subject of the prohibition or regulation of the sale of intoxicating liquors, and I respectfully refer your Honors to a reading of the opinion of Mr. Justice Gary. Judge Gary cites a vast array of authorities, among others, the Supreme Court of Mississippi, in the case of **Stone vs. Miss. 101 U. S. 814, 25 L. Ed. 1079:** "The government is organized with a view to their preservation (health and morals) and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed and the discretion cannot be parted with any more than the power itself."

And again, quoting from **Mugler vs. Kansas, 123 U. S. 660, 31 L. Ed. 210:** "Power to determine such questions so as to bind all must exist somewhere. * * * Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what is known as the police powers of the State."

And again, quoting from **Cooley's Constitutional Limitations, p. 201:** "It was a question for the law-making body. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinion upon points of right, reason and expediency with a law-making body."

And, again, quoting from **Barbier vs. Connolly, 113 U. S. 27, 28 L. Ed. 923:** "And neither the amendment (14th), broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed police power."

Counsel cites the case of **Lochner vs. N. Y. 198 U. S. 56.** That case held that an attempt to limit the hours of work in a bake shop to ten hours was an arbitrary interference with the right to contract, so I hardly see how counsel can get much comfort out of this decision, especially when we consider that it was decided by a divided court, five to four. I respectfully call attention to the dissenting opinion of Justices Harlan, White, Day and Holmes.

The case of **Hooper vs. California, 155 U. S. 662,** was with reference to an insurance policy and an attempt to discriminate against foreign companies, so it is not in point.

I do not see how counsel can get much comfort out of the Powell case. **127 U. S. 678.** There the court upheld an oleomargarine law and among other announcements, I quote the following from the Syllabus. "Although legislation on this subject may be unique or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, yet the courts cannot interfere without usurping powers committed to another department of government; the appeal

must be to the legislature or to the ballot box, not to the judiciary."

Mugler vs. Kansas is cited by counsel, **123 U. S. 661.** That case upheld the constitutionality of the Kansas prohibition law and a careful reading of the case will disclose the fact that the statute was upheld in toto and is practically the same as the Mississippi statute.

Dobbins vs. Los Angeles, 195 U. S. 224, presents an entirely different case. There a site had been bought for the purpose of erecting a gas plant and work actually begun when the city passed an ordinance which would not only destroy property rights, but would, in effect, have interfered with its contract with the gas company.

THE WILSON ACT.

We are of the opinion that in the case at bar, the question of interstate commerce is not involved. The Wilson Act, so often referred to by counsel for appellant, is, in our judgment, not necessarily involved in this litigation, for the reason that no attempt has been made to bring this beverage into the State. We shall, however, discuss this subject later on.

We apprehend that when the Court is called upon to construe the Wilson Act, and to determine what it meant, it will say that the Wilson Act meant to make all classes of liquors, whether intoxicating or not, the sale of which was prohibited by a State statute, to come within the provisions of the Wilson Act. In short, the object of the Wilson Act was to aid and not to hamper the states in enforcing their prohibition laws.

After the decision of the "Original Package Cases," Congress found it necessary, in order to protect the prohibition statutes of the various states, to enact a law (known as The Wilson Act), "the purpose of which, as declared by the United States Supreme Court, was to allow State laws to operate on liquor shipped from one State into another so as to prevent the sale of original

packages in violation of the State laws." 17 A. & E., Enc. Law (2 Ed. p. 293.)

The constitutionality of this act is well established by a long line of decisions, and the only inquiry which now presents itself for consideration is whether or not liquors which are neither fermented, distilled, or intoxicating, are embraced in the Wilson Act. The purpose of the statute would fail unless the object of its enactment was accomplished. It seems clear that it was the purpose of Congress to allow the several states to take charge of all liquors, the sale of which was prohibited in those states, as soon as such liquors reached the consignee. If it be admitted that Poinsetta is neither fermented, distilled, nor intoxicating, still, since it is a malt liquor and therefore embraced within the prohibition statutes of Mississippi, and perhaps other states, it comes within the purview of the Wilson Act, for the reason that so far as Congress is concerned, it is an intoxicating liquor; that is to say, it is in the class of liquors prohibited by the laws of Mississippi and is classified as an ntoxicant. If such were not the case, then the object of the statute would fail. Suppose, for instance, that the legislature of Mississippi should do as other legislatures have done, define an intoxicating liquor to be any vinous, spiritous or malt liquor, then so far as the statute is concerned, Poinsetta, being a malt liquor, would be an intoxicating liquor. The legislature of the State could do this at any time and thus bring any drink within the Wilson Act, and there is no reason why the mere prohibition of the sale of a malt liquor without defining it as being an intoxicant would not have the same effect.

"It may be regarded as settled law that to render the statute (the Wilson Act) operative, new State legislation on the subject is unnecessary, and the statute gives full force and effect to existing State legislation." 17 A. and E. Enc. Law (2nd Ed.), pp. 293-294; Black on Intoxicating Liquors, Sec. 34; Tinker v. State, 90 Ala., 638.

The very reading of the Wilson Act, 3rd Fed. Stat.

Anno. p. 853, carries conviction that Congress intended to commit the entire subject of dealing with liquors of all sorts prohibited by the several states, to those states. Note the expression: "To the same extent and in the same manner as though such liquids or liquors had been produced in such states."

Congress could not be expected to foresee the many imitations and counterfeits and subterfuges which would be resorted to and therefore used language seemingly broad enough to cover all sorts of liquors which the states might prohibit.

In the case of Wilkerson vs. Rahrer, 140 U. S. 545, which is the leading case on the construction of the Wilson Act, exactly the same point here involved was not raised, for the reason that the liquors seized were intoxicating without doubt and hence clearly within the Wilson Act. In the instant case, the liquors are not intoxicating, but are malt and it is the effort of the appellant to hold the terms of the Wilson Act to a technically strict construction. In his view of the case, Poinsetta which has not reached that advanced stage of fermentation which produces alcohol and which is neither distilled nor intoxicating, does not come within the terms of the Wilson Act, and therefore could be sold in original packages in Mississippi if imported from Tennessee. If this contention prevailed, what would become of the prohibition laws of the States? The question could be raised over and over again, and proof demanded that each new drink concocted by designing tradesmen, would have to be submitted to an analysis and the chemical process through which the same passed would have to be disclosed and the case fought through the courts in order to determine whether or not the Wilson Act was broad enough to cover it. Congress certainly could have had no such intention.

I quote from the Rahrer case at the bottom, page 577, of Book 35 Law Ed: "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws, in respect to imported packages in their original condition,

created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. Therefore, if it was the purpose of Congress to commit the matter to the states, it would be a strange construction, and at war with reason to hold that it committed to the states the regulation of certain liquors and not of all liquors falling under the ban of the prohibition statute of the states.

I quote again from the same case, at the top of page 577:

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

See also Rhodes vs. Iowa 170 U. S. 412 (42 L. Ed. 1088.)

A discussion of the Wilson Act will be found in **Black on Intoxicating Liquors, Secs. 76, 77, 78,** to which we invite the Court's attention.

We think it clear that it was the legislative purpose to commit the whole subject to the states, and that Congress, in enacting the Wilson Act, did what it intended to do. It would be doing a vain thing if it committed this matter to the states, and then the states were powerless to carry out their own prohibition statutes, the very thing which Congress atempted to aid them in doing. A maxim of the common law is "'**verba intentione debent inservire;**" (words are to be governed by their intention). I take it, therefore, that the use of the words in the Wilson Act, "fermented, distilled and intoxicating," means liquors condemned by the prohibition statutes of the various states to which the matter was committed by Congress.

The case of **Pabst Brewing Company vs. Crenshaw, 198 U. S. 17,** 49 L. Ed., p. 925, while it does not decide the exact point in controversy, here, is a strong argument in favor of the affirmance of the instant case. Run-

ning all through the opinions and briefs of counsel is the idea that malt liquors, whether intoxicating or not, were intended to be embraced within the scope of the Wilson Act. That case decided the validity of a State inspection law providing for "the inspection of beer and malt liquors." Nothing is said in the title or in the text of the bill about intoxicating liquors and counsel did not raise the point that the Wilson Act did not embrace non-intoxicating malt liquors, seeming to take it for granted that the Wilson Act covered all liquors, the traffic in which was prohibited or regulated in any way by the states.

I quote from page 928 (L. Ed.): "The subject with which the statute deals is beer and other malt liquors. Plainly it operates upon such liquors only when manufactured in the State, or, if shipped from other states, after their arrival in the State, when they are held there for sale and consumption therein."

The opinion of Mr. Justice White thus seems to recognize the fact that malt liquors are embraced in the Wilson Act. At the bottom of page 929, he quotes with approval from a Missouri case: "In our opinion, it (the law) is a police regulation imposing conditions upon the business of manufacturing and selling beer and malt liquors in this State, which business the State may absolutely suppress or may permit upon such terms as the legislature may prescribe." At the conclusion of the opinion, Mr. Justice White uses this language: "Indeed, the whole argument upon which the entire case of appellant proceeds, rests upon this fallacious presumption since it admits, on the one hand, the validity of the Wilson law and yet, seeks to take this case out of the reach of its provisions by distinctions which have no foundation in reason, unless it be that the law is to be disregarded by holding it unconstitutional."

In the dissenting opinion, Mr. Justice Brown seems to treat malt liquors as coming within the Wilson Act without regard to their intoxicating properties.

I desire to quote again from the opinion in **Wilkerson vs. Rharer, supra,** on page 575 of Book 5, L. Ed:

"Congress may regulate but the states determine what shall or shall not be regulated. * * * The police power would not only be a formidable rival, but in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subject to be regulated." On page 576: "It follows, as a corrollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured."

It seems clear that the principal object Congress had in enacting the Wilson law was to correct the evil of shipment in original packages. Congress did not have in mind the refined distinctions attempted to be drawn between the kinds of liquors to which the bill might apply. Its object was to make easy the enforcement of State prohibitory laws, and to remove an impediment which shipment in original packages, because of interstate commerce, had thrown in the way of its enforcement.

It could never have been the purpose of Congress to commit to the states the regulation of one kind of liquor, the sale of which was prohibited or circumscribed by the State law, and decline to commit to the State the regulation of another kind of liquor falling within the condemnation of the same State statute. Such a construction of the Federal statute would be strained and unreasonable. No purpose could be ascribed to the lawmaking power of the nation in passing such an act unless it did actually commit to the states the regulation of traffic in all liquors then or thereafter prohibited or regulated by State law.

Counsel argues that because it is admitted that Poinsetta is not intoxicating it does not fall within the Wilson bill. Would counsel contend that if the State law had defined an intoxicating liquor to mean any spiritous, vinous, malt or alcoholic liquor, whether in fact intoxicating or not, then the Wilson Act would not govern? The fallacy of such a contention is obvious. All that would be necessary, according to this contention, would

be for the State legislature to have arbitrarily defined intoxicating liquors. Congress could not have had such a purpose in mind. No further legislation by the State is necessary. Whatever liquors are classed among those prohibited, fall within the terms of the Wilson Act, whether the State legislature defines intoxicating liquors or not. Any other construction would put the states in position, by laws subsequently enacted, to say what Congress means. For instance, the legislature of Mississippi could now pass an act defining intoxicating liquor and then the point could not be raised. Surely Congress did not intend to pass a law twenty years ago so that it would mean one thing, then have the legislatures of the various states give their definitions of the words "intoxicating liquors," many years later. Congress meant only one thing and that was to commit to the states entire regulation and control of the liquor traffic, that is, the traffic in all liquors prohibited or regulated by the states.

ORIGINAL PACKAGE.

Counsel goes at length into a discussion of the proposition of what constitutes an original package; whether, in the instant case, each bottle or the container is the original package. I really do not think it is a matter of great importance, as to which view is adopted, for the reason that since, in my opinion, the Wilson bill applies, if interstate commerce is involved, and the sale of either would be in violation of the law. However, I think it clear that the container, or box in which these bottles are packed, is the original package. See:

17 A. and E. Enc. Law (2nd Ed.), p. 294, 295 and notes.

Black on Intoxicating Liquors, Sec. 75.

Harrison vs. State, 10 Sou. 30.

Keith vs. State, 8 Sou. 353.

Cook vs. Marshall Co., 196 U. S. 261 (49 L. Ed. 471).

CONCLUSION.

We admit that Poinsetta and other liquors are articles of commerce. We admit that, but for the Wilson bill, original packages could be shipped into the State and sold; but I do not admit that each bottle is an original package. We think the original package is the package just as it is put up for shipment, and is shipped and delivered to the consignee in an unbroken condition.

The Court must determine whether the Wilson Act covers non-intoxicating malt beverages as well as intoxicating; and if not, then whether each bottle, or the crate in which they are packed and shipped and delivered to the consignee is the original package.

The Court must determine whether the State prohibition law of Mississippi deprives the appellant of property without due process of law; and whether the State has the right, under its broad police power, to prohibit the sale of harmless malt beverages as well as those which intoxicate, if, in the judgment of the legislature it is necessary to be done.

We think the case was properly decided by the Supreme Court of Mississippi and respectfully submit that the judgment should be affirmed.

EDWARD MAYES,
ROBT. B. MAYES,
JAS. R. McDOWELL,
Amici Curiae.